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No. 3091

United States Circuit Court of Appeals

For the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,

Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPORATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3091

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Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPORATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

In the United States District Court, in and for the District of Nevada, 9th Judicial Circuit.

CLARA M. WIGHT, and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY, and T. T. C. GREGORY, Her Husband,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Amended Bill of Complaint.

To the Honorable, the Judges of the United States District Court, in [1*] and for the District of Nevada, 9th Judicial Circuit:

Now comes Clara M. Wight and Otis B. Wight, her husband, citizens and residents of the State of Oregon, and Gertrude M. Gregory and T. T. C. Gregory, her husband, citizens and residents of the State of California, with leave of Court first had and obtained, file this, their amended bill against the Washoe County Bank, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and a citizen and resident of the State of Nevada, and the Estate of W. O'H. Martin, In-

*Page-number appearing at foot of page of original certified Transcript of Record.

corporated, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and a citizen and resident of the said State of Nevada and thereupon your orators complain and say:

I. That your orators, Gertrude M. Gregory and T. T. C. Gregory, are now and at all the times mentioned were husband and wife.

II. That your orators, Clara M. Wight and Otis B. Wight, are now and at all the times mentioned were husband and wife.

III. That the said defendant, Washoe County Bank, is now and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada.

IV. That the said defendant, Estate of W. O'H. Martin, Incorporated, is now and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada.

V. That this controversy is wholly between citizens of different states in this: That the said Clara M. Wight and Otis B. Wight, her husband, are citizens and residents and inhabitants of the State of Oregon, and that plaintiffs, Gertrude M. Gregory and T. T. C. Gregory, her husband, are citizens and residents of the State of California, and that both of the said defendants, Washoe County Bank and Estate of W. O'H. Martin, Incorporated, are citizens and residents and inhabitants of the State of Nevada, in this: That both of said corporations are organized and incorporated and existing under and by virtue

of the laws of the said State of Nevada, and doing business therein; that the said defendants, George W. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and *A. D.* Bender, are, and each of them is, a [2] resident, citizen and inhabitant of the said State of Nevada.

VI. That your orators, Clara M. Wight and Gertrude M. Gregory, are now and for the period of about ten years last past have been the owners of two hundred shares each of the capital stock of the said defendant, Estate of W. O'H. Martin, Incorporated, and that both the said Clara M. Wight and Gertrude M. Gregory were such shareholders at all times that the transactions hereinafter alleged took place, and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

VII. That the officers and managing directors of the said Estate of W. O'H. Martin, Incorporated, are Louise W. Martin, the president thereof, Anna H. Martin, Margaret S. Martin and Edward Barber, the other directors thereof, and that said persons are the managing directors of said Estate of W. O'H. Martin, Incorporated.

VIII. That this action is brought by there plaintiffs and not by the Estate of W. O'H. Martin, Incorporated, for the reason that the said plaintiffs, Clara M. Wight and Gertrude M. Gregory, as such shareholders of the said Estate of W. O'H. Martin, Incorporated, have frequently requested and de-

manded the managing directors of the said Estate of W. O'H. Martin, Incorporated, that the Estate of W. O'H. Martin, Incorporated, should bring this suit, and that the said plaintiffs, Clara M. Wight and Gertrude M. Gregory, have at divers times requested Louise W. Martin, the president of said Estate of W. O'H. Martin, Incorporated, and also of Anna H. Martin, Margaret S. Martin and Edward Barber, the other directors of said Estate of W. O'H. Martin, Incorporated, that they bring this suit, and that on the 9th day of September, 1912, the plaintiff, Clara M. Wight, and John S. Partridge, one of her solicitors and counsel, *journed* to the City of Reno, State of Nevada, where is located the principal place of business of the said Estate of W. O'H. Martin, Incorporated, and then and there demanded and importuned of the said directors of the said Estate of W. O'H. Martin, Incorporated, that they should bring this suit, and that thereafter the said Clara M. Wight and Gertrude M. Gregory served upon the managing directors a written demand that they proceed forthwith to bring this suit, which said [3] named written demand was made upon the said managing directors upon the 18th day of November, 1912, and that the said officers and directors of said Estate of W. O'H. Martin, Incorporated, have refused and neglected and still do refuse and neglect to bring this suit, or any suit, for the recovery of the shares hereinafter mentioned, or to compel the officers and directors of the said Washoe County Bank to transfer the shares of stock hereinafter mentioned, on their books, or to issue a new certifi-

cate or certificates therefor, or to pay to said Estate of W. O'H. Martin, Incorporated, the dividends thereon.

IX. That the defendant, George W. Mapes, is the president of the defendant, Washoe County Bank, a corporation, and that the defendant C. T. Bender is the cashier thereof, and that the said defendants George W. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender are the managing directors of the said Washoe County Bank.

X. That one W. O'H. Martin died on or about the 14th day of September, 1910, leaving a last will and testament wherein and whereby the said W. O'H. Martin bequeathed all of his property and estate to your orators and to the said Louise W. Martin, Anna H. Martin, Margaret S. Martin and to Harry M. Martin and Carl Martin, brothers of your orators and sons of the said W. O'H. Martin, deceased, and the said Louise W. Martin, his wife; that thereafter the defendant Estate of W. O'H. Martin, Incorporated, was formed for the purpose of better conducting and handling the affairs and business of the properties so bequeathed by the said W. O'H. Martin, and that your orators and the said Louise W. Martin, Anna H. Martin, Margaret S. Martin and Carl Martin conveyed all of the said property so bequeathed to them to said corporation and received in exchange therefor the stock of said Estate of W. O'H. Martin, Incorporated.

XI. That amongst the property so conveyed by

said legatees to said corporation Estate of W. O'H. Martin, Incorporated, was a certain fifty (50) shares of the capital stock of the said defendant Washoe County Bank, which said fifty (50) shares became and remained and at all the times herein mentioned was, and ever since has been and still is the property of said Estate [4] of W. O'H. Martin, Incorporated, and in the year 1902 the said defendant Estate of W. O'H. Martin, Incorporated, was and ever since has been, and still is the owner of the said fifty (50) shares of the capital stock of the said defendant Washoe County Bank.

XII. That in the year 1902 the said defendant Estate of W. O'H Martin, Incorporated, caused to be transferred upon the books of said defendant Washoe County Bank the said fifty (50) shares of capital stock of said Washoe County Bank into the name of the said Harry M. Martin for the purpose only of qualifying the said Harry M. Martin to become a director of the said Washoe County Bank.

XIII. That a certificate for said fifty (50) shares of the capital stock of said Washoe County Bank was thereupon issued by said Washoe County Bank to the said Harry M. Martin and that the said Harry M. Martin then and there upon and with the knowledge and consent of said Washoe County Bank, retransferred the said certificate representing said fifty (50) shares of said capital stock of the Washoe County Bank to the said defendant Estate of W. O'H. Martin, Incorporated, and that it was at all times understood by and between the said defendant Washoe County Bank and said defendant Estate

of W. O'H. Martin, Incorporated, that the said shares should stand upon the books of said defendant Washoe County Bank only to enable the said Harry M. Martin to become a director thereof and that the ownership of the same should be and remain in the said defendant Estate of W. O'H Martin, Incorporated, and that the sole and only purpose of the transfer of the same into the name of said Harry M. Martin was to qualify him to become a director of said Washoe County Bank.

XIV. That at the time of the transaction alleged in paragraph XIII of this complaint, the said Estate of W. O'H. Martin, Incorporated, was and ever since has been and still is the owner of two hundred (200) shares of the capital stock of said defendant, Washoe County Bank, in addition to the fifty (50) shares thereof hereinabove mentioned, and that it was at all times well understood by said Washoe County Bank that the officers and directors thereof, that the said Harry M. Martin became a director of said Washoe County Bank as representing the interests of said Estate of W. O'H. Martin, [5] Incorporated.

XV. That said Harry M. Martin ceased to be a director of said defendant, Washoe County Bank, in the year 1905.

XVI. That at all times after the transactions alleged in paragraph XIII of this bill of complaint (up to the time hereinafter alleged), said defendant Washoe County Bank continued to pay all dividends upon said fifty shares of stock to said Estate of W. O'H. Martin, Incorporated, and that said Washoe

County Bank continued to treat said Estate of W. O'H. Martin, Incorporated, as the owner thereof.

XVII. That in the year 1911 (the exact time is unknown to your orators, or either of them), said Washoe County Bank for the first time claimed that said Estate of W. O'H. Martin, Incorporated, was not the owner of said fifty shares, and ceased and refused to pay to said Estate of W. O'H. Martin, Incorporated, and further dividends thereon.

XVIII. That since said time in 1911 (the exact time being unknown to your orators, or either of them), your orators are informed and believe, and therefore allege, that the sum of $850.00 has been declared as dividends upon said fifty shares, but that said Washoe County Bank has refused and neglected, and still does refuse and neglect to pay the same, or any part thereof, and that said sum of $850.00 is due and payable to said Estate of W. O'H. Mattin, Incorporated.

XIX. That at said time in 1911 (the exact time being unknown to your orators, or either of them), when said Washoe County Bank ceased and refused to pay any further dividends on said fifty shares, and claimed for the first time that said shares did not belong to said Estate of W. O'H. Martin, Incorporated, said Estate of W. O'H. Martin, Incorporated, presented to said Washoe County Bank the certificate for said fifty shares, duly endorsed by said Harry M. Martin, and demanded of said Washoe County Bank that it immediately transfer said fifty shares on its books into the name of said Estate of W. O'H. Martin, Incorporation, and issue a new cer-

tificate therefor, but that said Washoe County Bank refused and neglected and still does refuse and neglect to so transfer said stock, or to issue a new certificate therefor.

XX. That the amount in controversy in this cause exceeds the sum of three [6] thousand (3,000) dollars, in this: That the value of the said fifty shares of the capital stock is the sum of ten thousand (10,000) dollars.

To that end, therefore, that your orators may have that relief which they can only obtain in a Court of Equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orators, they now pray the Court that it please your Honors to grant to your orators a writ of subpoena to be directed to the said defendants, thereby commanding them at a certain time and under a certain penalty therein, to be limited, personally to appear before this Honorable Court and then and there, full, true and direct, and perfect answer, make to all and singular the premises, and to sustain, perform and abide by such order, direction and decree as may be made against them in the premises, and that the said defendant, Washoe County Bank, and the said defendants, George W. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, be compelled and directed by decree of your Honors to retransfer the said fifty shares capital stock of said Washoe County Bank upon the books of said defendant, Washoe County Bank, and to

issue to the said defendant, Estate of W. O'H. Martin, Incorporated, a certificate or certificates therefor, and to pay to said defendant, Estate of W. O'H. Martin, Incorporated, all dividends accrued or to accrue thereon, and for such other and further relief as may be meet and agreeable to equity, and for their costs most wrongfully herein incurred.

JOHN S. PARTRIDGE,
Solicitor and of Counsel for Plaintiffs.

State of California,
City and County of San Francisco,
Northern District of California,
9th Judicial Circuit,—ss.

T. T. C. Gregory, being first duly sworn, makes solemn oath, and says: That he is one of the plaintiffs, in the above-entitled bill; that he has read the same and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

T. T. C. GREGORY.

Subscribed and sworn to before me this 9th day of May, 1913.

[Seal] W. T. HESS,
Notary Public in and for the City and County of San Francisco, State of California, Room 708, Hearst Bldg. [7]

[Indorsed]: No. 1636. In the United States District Court, in and for the District of Nevada, 9th Judicial Circuit. Clara M. Wight, and Otis B. Wight, Her Husband, and Gertrude M. Gregory and

T. T. C. Gregory, Her Husband, Plaintiffs, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Inc., et al., Defendants. Amended Bill of Complaint. Filed May 10, 1913, T. J. Edwards, Clerk. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco.

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Answer of All Defendants Except Estate of W. O'H. Martin, Incorporated, a Corporation.

Now come all the above-named defendants, except Estate of W. O'H. Martin, Incorporated, a corporation and for answer to said plaintiffs' amended complaint herein, allege:

1. These defendants deny that this controversy is

wholly between citizens of different States, and deny that the said defendants F. M. Rowland and D. A. Bender, or either of them, at the time of the commencement of this action, were residents, citizens or inhabitants of the State of Nevada, and allege that at the time of the commencement of this action, said F. M. Rowland and D. A. Bender, and each of them, were and now are, residents, citizens and inhabitants of the State of California.

2. Deny that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case over which it would not otherwise have cognizance.

3. With respect to the allegation of plaintiff's amended complaint "That this action is brought by these plaintiffs, and not by the Estate of W. O'H. Martin, Incorporated, for the reason that the said plaintiffs Clara M. Wight and Gertrude M. Gregory as said shareholders of the said Estate of W. O'H. [8] Martin, Incorporated, have frequently requested and demanded of the managing director of said Estate of W. O'H. Martin, Incorporated, that the Estate of W. O'H. Martin, Incorporated, should bring this suit, and that the plaintiffs, Clara M. Wight and Gertrude M. Gregory, have, at diverse times, requested Louise M. Martin, the president of said Estate of W. O'H. Martin, Incorporated, and also Anna H. Martin, Margaret S. Martin and Edward Barber, the other directors of said Estate of W. O'H. Martin, Incorporated, that they bring this suit," these defendants are without knowledge.

4. That with respect to the allegation of said

plaintiffs' amended complaint, "That the plaintiff Clara M. Wight and Joseph S. Partridge, one of her solicitors and counsel, journeyed to the City of Reno, State of Nevada, where is located the principal place of business of the said Estate of W. O'H. Martin, Incorporated, and then and there demanded and importuned of the said directors of said Estate of W. O'H. Martin, Incorporated, that they should bring this suit," these defendants are without knowledge.

5. That with respect to the allegation of said plaintiffs' amended complaint, "That thereafter the said Clara M. Wight and Gertrude M. Gregory served upon the said managing director a written demand that they proceed forthwith to bring this suit, which said last-named demand was made upon the said managing director on the 18th day of November, 1912, and that the said directors and officers of said Estate of W. O'H. Martin, Incorporated, have refused and neglected, and still do refuse and neglect to bring this suit, or any suit, for the recovery of the shares hereinafter mentioned, or to compel the officers or directors of said Washoe County Bank to transfer the stock therein mentioned on their books, and to issue a new certificate or certificates therefor, or to pay said Estate of W. O'H. Martin, Incorporated, the dividends thereon," these defendants are without knowledge.

6. That as to the allegations of paragraph X of plaintiffs' amended complaint, these defendants are without knowledge.

7. That with respect to the allegation of para-

graph XI of plaintiffs' amended complaint, these defendants are without knowledge.

8. These defendants deny that in the year 1902, or any other time, the said defendant Estate of W. O'H. Martin, Incorporated, or any one else, caused [9] to be transferred on the books of said Washoe County Bank the said, or any, 50 shares of the capital stock of said Washoe County Bank into the name of Harry M. Martin for the purpose only of qualifying the said Harry M. Martin to become a director of said defendant Washoe County Bank.

9. That these defendants admit that on February 9th, 1903, 50 shares of the capital stock, which then stood upon the books of said bank in the name of the Estate of W. O'H. Martin, Incorporated, was regularly transferred and a new certificate issued therefor to and in the name of Harry M. Martin but these defendants deny that said Harry M. Martin then or thereupon or at any time, with the knowledge or consent of said Washoe County Bank, retransferred the said certificate representing the said 50 shares of said capital stock of the Washoe County Bank to the said defendant, Estate of said W. O'H. Martin, Incorporated. And these defendants deny that it was at all times or any time, understood by or between the said defendants Washoe County Bank and said Estate of W. O'H. Martin, Incorporated, that the said shares should stand upon the books of said defendant Washoe County Bank only to enable the said Harry M. Martin to become a director thereof, or that the ownership of the same should be or remain in the said defendant Estate of W. O'H. Martin,

Incorporated, and deny that the sole or only purpose of said transfer of the same into the name of said Harry M. Martin was to qualify him to become a director of said Washoe County Bank, and deny that it was at all or any time wholly or at all understood by the said Washoe County Bank or the officers and directors thereof that the said Harry M. Martin became a director of said Washoe County Bank as representing the interests of the Estate of W. O'H. Martin, Incorporated. These defendants deny that at any time after the said certificate for the 50 shares of stock was issued to said Harry M. Martin, as aforesaid, that the said Washoe County Bank paid any of the dividends upon the said 50 shares of stock to the Estate of W. O'H. Martin, Incorporated. And these defendants allege that all dividends declared and paid by said Washoe County Bank upon said 50 shares represented by said certificate issued to said Harry M. Martin on February 9th, 1903, as aforesaid, have been paid to Harry M. Martin or his order, or credited by said Washoe County Bank upon the indebtedness of said Harry M. Martin to said Washoe County Bank. And [10] these defendants deny that said Washoe County Bank, after the issuance of said certificate for said 50 shares to said Harry M. Martin, treated or continued to treat said Estate of W. O'H. Martin, Incorporated, as the owner thereof. And these defendants deny that in the year 1911 said Washoe County Bank for the first time claimed that said Estate of W. O'H. Martin, Incorporated, was not the owner of said 50 shares of the capital stock, or for the first time refused to pay

the Estate of W. O'H. Martin, Incorporated, any dividends thereon. These defendants deny that the sum of $850 or any other sum is due or payable by said Washoe County Bank to said Estate of W. O'H. Martin, Incorporated.

10. These defendants deny that the Estate of W. O'H. Martin, Incorporated, at any time since the 3d day of February, 1902, has been the owner of or had any title or estate or interest in said 50 shares of stock then transferred to said Harry M. Martin, which is superior to the claim and lien of said Washoe County Bank thereon for the indebtedness of said Harry M. Martin as hereinafter set forth.

11. And these defendants further allege that in the year 1909, said Washoe County Bank first learned that said Estate of W. O'H. Martin, Incorporated, claimed to be the owner of said 50 shares of stock, and then and ever since has refused, to transfer said shares of stock upon the books of said Bank from the said Harry M. Martin to the Estate of W. O'H. Martin, Incorporated, because of the indebtedness of said Harry M. Martin to said Bank and the lien of said Bank upon said stock, all of which said Estate of W. O'H. Martin, Incorporated, in the year 1909, and ever since, well knew. These defendants admit that in July, 1911, the said Estate of W. O'H. Martin, Incorporated, presented to said Washoe County Bank for the first time a certificate for said 50 shares duly indorsed by said Harry M. Martin, and demanded of said Washoe County Bank that it immediately transfer said 50 shares on its books into the name of said Estate of W. O'H. Mar-

tin, Incorporated, and issue a new certificate therefor. And that said Washoe County Bank then refused and still does refuse to transfer said stock as aforesaid, or issue a new certificate therefor. And these defendants allege that the reason of the refusal of said Washoe County Bank to transfer said stock and issue a new certificate **[11]** therefor as demanded, was and is the indebtedness of said Harry M. Martin to said Washoe County Bank, as hereinafter set forth, and the lien of the said Bank thereon, all of which the said Estate of W. O'H. Martin, Incorporated, then well knew.

12. And these defendants, for further answer to said amended bill of complaint, aver, that on February 10, 1903, the said Harry M. Martin was appointed a director of the said Washoe County Bank, and on the 30th day of said month took his oath of office, as such, and thereafter, by regular election said Harry M. Martin continued to be and was a director of said Washoe County Bank until July 1, 1905. That since the 3d day of February, 1903, and while the said Harry M. Martin was the holder of said 50 shares of stock and a director of said Bank, and since he ceased to be such, the said Harry M. Martin has at various times been indebted to the Washoe County Bank for money borrowed by him from said Bank, and before the year 1909, when said Washoe County Bank first knew that said Estate of W. O'H. Martin, Incorporated, claimed to be the owner of said 50 shares of stock, which stands in the name of said Harry M. Martin as aforesaid, the said Harry M. Martin became, and ever since

has been, and now is, indebted to the said Washoe County Bank for more than $15,000.

13. That Section 1 of Article IX of the By-Laws of said Washoe County Bank at all times herein mentioned was and now is as follows:

> "Section 1. Certificates of stock in such form and device as the trustees may direct, shall be issued to the shareholders of the banking corporation according to the number of shares belonging to each respectively, and those certificates shall be transferable by indorsement and delivery thereof, the transaction to be complete only when recorded upon the books of the banking corporation. But no transfer of stock shall be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking corporation by the persons in whose name the stock stands on the books of the corporation, except with the consent in writing of the President."

That at all the times herein mentioned, there has been and now is printed upon the face of each certificate of stock of said Washoe County Bank a statement that said stock is "Transferable only on the books of the company by endorsement and surrender of this certificate after compliance with the conditions printed on the back," and that each certificate of stock of said Washoe County Bank has printed upon the back thereof the following:

> "No transfer of the stock described in this certificate shall be made upon the books of the

corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking **[12]** corporation by the person in whose name the stock stands upon the books of the corporation, except with the consent in writing of the President."

That when said 50 shares of stock was transferred to the said Harry M. Martin and a certificate issued him therefor, the owner thereof well knew that said stock was liable for any debt of the said Harry M. Martin to said Washoe County Bank, that the Bank had a lien thereon for such debt, and that the same would not be transferred as long as said Harry M. Martin was indebted to the said Bank, except upon the written consent of the president thereto; that the president of said Bank has never consented that said Martin should transfer said stock without the payment of his indebtedness to said Bank; and that said Estate of W. O'H. Martin, Incorporated, when it first claimed to said Washoe County Bank that it was the owner of said 50 shares of stock in 1909, well knew that said Harry M. Martin then was and for a long time prior thereto had been indebted to said Washoe County Bank in an amount in excess of the value of said 50 shares of stock. That said Washoe County Bank did not know that said Estate of W. O'H. Martin, Incorporated, was the holder of said certificate of 50 shares of stock issued to said Harry M. Martin, as aforesaid, or that the said Harry M. Martin had endorsed said certificate of stock until the same was presented to said Washoe

County Bank for transfer in July, 1911, and at said time the said Washoe County Bank was absolutely prohibited by the laws of the State of Nevada from transferring said certificate from the name of Harry M. Martin to any other person until the indebtedness of said Harry M. Martin to said Bank was paid.

And these defendants further answering said amended complaint, aver that it appears from said amended complaint that the plaintiff's cause of action arises out of an agreement which is illegal, against public policy and a fraud upon the stockholders and creditors of said Washoe County Bank, and is such an agreement as precludes the plaintiffs from receiving in a Court of Equity any relief from a situation created in consequence thereof, and prevents the plaintiffs from obtaining the relief asked in this suit.

Wherefore, said defendants pray that the plaintiffs take nothing by this suit, and that defendants have judgment for their costs and such other relief as may be meet and proper in the premises. **[13]**

CHENEY, DOWNER, PRICE & HAWKINS and
A. E. CHENEY,
Solicitors for said Defendants.

State of Nevada,
County of Washoe,—ss.

C. T. Bender, being sworn, says: He is the secretary and cashier of the defendant, Washoe County Bank, and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except the matters

therein stated on information and belief, and as to those matters he believes it to be true.

C. T. BENDER.

Subscribed and sworn to before me this 12th day of March, 1914.

[Seal] JOHN M. WRIGHT,
Notary Public.

My commission expires October 29, 1917.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, et al., Defendants. Answer of all Defendants, except Estate of W. O'H. Martin, Incorporated, a Corporation. Filed this 14th day of March, 1914. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for said Defendants.

In the United States District Court, in and for the District of Nevada.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY, and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPORATED, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND,

C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Separate Answer of the Estate of W. O'H. Martin, Incorporated, to the Amended Bill of Complaint.

The defendant, the Estate of W. O'H. Martin, Incorporated, for answer to the Amended Bill of Complaint herein, or so much thereof as this defendant is advised is material or necessary for it to make answer unto, answering says:

I. Admits that the plaintiffs, Gertrude M. Gregory and T. T. C. Gregory, were at the time of filing said bill, and at all times therein mentioned, **[14]** and now are, husband and wife.

II. Admits that the complainants Clara M. Wight and Otis B. Wight were at the time of the filing of said bill, and at all the times therein mentioned, and now are, husband and wife.

III. Admits that the defendant, the Washoe County Bank, was at the time of filing said bill, and at all the times mentioned therein, and now is, a corporation existing under and by virtue of the laws of the State of Nevada.

IV. Admits that this defendant, the Estate of W. O'H. Martin, Incorporated, was at the time of the filing of said bill, and at all the times mentioned therein, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

V. Admits that the controversy in this action is wholly between citizens of different states, and admits the citizenship of all of the parties thereto as alleged in paragraph V of said bill.

VI. Admits that the complainants, Clara M. Wight and Gertrude M. Gregory, now are, and for about ten years before the commencement of this action have been, the owners of two hundred (200) shares each of the capital stock of this defendant, and that said complainants were shareholders thereof at all of the times mentioned in said bill, and that this suit is not collusive for the purpose of conferring upon the Court of the United States a jurisdiction of a cause of which it would not otherwise have cognizance.

VII. Admits that the managing officers and directors of this defendant, are the persons named and set out in paragraph VII of said bill.

VIII. Admits that said action was brought by said complainants and not by this defendant for the reason that said complainants Clara M. Wight and Gertrude M. Gregory, as shareholders of this defendant, have requested and demanded of the managing directors of this defendant that this action be brought, and have at divers times requested the president and directors named in said bill that they should institute this action. Admits that the complainants Clara M. Wight and her solicitor, John S. Partridge, journeyed to the City of Reno, State of Nevada, the principal place of business of this defendant, and then and there demanded of the directors of this defendant that they should bring

this suit; admits that thereafter the said [15] complainants, Clara M. Wight and Gertrude M. Gregory, served upon the managing directors of this defendant a written demand that they proceed at once to bring this suit upon the date as in said bill alleged; admits that the officers and directors of this defendant have refused and neglected, and still refuse and neglect to bring any action for the recovery of the shares of stock mentioned in said bill, or any action to compel the officers and directors of said Washoe County Bank to transfer the shares of stock mentioned in said bill on its books, or to issue new certificate or certificates therefor, or to pay to this defendant the dividends thereon.

IX. This defendant admits that the persons named, as it is informed and believes, in paragraph IX of said bill, are the officers and managing directors of this defendant, the Washoe County Bank.

X. Admits all the facts as alleged in said bill in paragraph X thereof to be true.

XI. Admits that all of the averments contained in paragraph XI of said bill are true.

XII. Admits all of the averments contained in paragraph XII of said bill, except it alleges that the transfer of said stock therein mentioned was made by this defendant in the year 1903 instead of the year 1902 as therein alleged.

XIII. Admits that all of the allegations contained in paragraph XIII of said bill are true.

XIV. Admits all of the averments in paragraph XIV of said bill to be true.

XV. Admits the averments of paragraph XV of said bill to be true.

XVI. Admits the allegations contained in paragraph XVI of said bill, but alleges that until July, 1909, the dividends were paid in checks drawn to the order of Harry M. Martin, which were sent to him, by him endorsed and credited to this defendant, and that after said date and until July, 1911, said dividends were paid in checks drawn to the order of Harry M. Martin, but sent directly to this defendant and by it endorsed as owner and which were paid by the defendant bank and credited to this defendant.

XVII. Admits the allegations contained in paragraph XVII of said bill, and alleges that the date when the defendant Bank made the claim alleged, was **[16]** on or about the month of July, in the year 1911.

XVIII. Admits the defendant Bank has refused to pay this defendant any and all dividends upon said stock from and including July, 1911, down to this time; and alleges the following dividends were declared on said stock and became due and payable to this defendant prior to the commencement of this suit, to wit, July, 1911, $300.00; January, 1912, $300.00; July, 1912, $250.00; January, 1913, $250.00, amounting in all to the sum of $1100.00.

And this defendant, further answering, says, that other and further dividends have accrued and become payable to it since the commencement of this suit, and that none of said dividends have been paid to it, and the defendant Bank refused and still re-

fuses to pay the same or any part thereof.

XIX. Admits the allegations contained in paragraph XIX of said bill, and alleges that the true date of the transaction therein referred to, is the month of July, 1911, and further, that in July, 1909, this defendant first demanded of the defendant Bank that it transfer to this defendant the said fifty shares and pay the dividends thereon directly to it.

XX. Admits the allegations contained in paragraph XX of said bill.

WHEREFORE, this defendant prays that it may be dismissed hence with its costs, and for such other and further relief as may be agreeable to equity.

GEORGE SPRINGMEYER,
Solicitor for Defendant, Estate of W. O'H. Martin, Incorporated.

State of Nevada,
County of Washoe,—ss.

Louise W. Martin, being first duly sworn, deposes and says: That she is an officer, to wit, the president of the Estate of W. O'H. Martin, Incorporated, one of the defendants named in said action; that she has read the foregoing answer and that the same is true of her own knowledge, except as to matters therein stated on her information or belief, and as to those matters, she believes it to be true.

LOUISE W. MARTIN. **[17]**

Subscribed and sworn to before me this 21st day of March, 1914.

[Seal] GEORGE SPRINGMEYER,
Notary Public.

[Indorsed]: Original. No. 1636. In the District Court of the United States in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank et al., Defendants. Answer to Amended Bill of Complaint. Filed this 23d day of March, 1914. T. J. Edwards, Clerk. George Springmeyer, Attorney for Estate of W. O'H. Martin.

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Opinion.

MASTICK & PARTRIDGE, for Plaintiffs.

CHENEY, DOWER, PRICE & HAWKINS, for All Defendants Except the Estate of W. O'H. Martin, Incorporated.

HARWOOD & SPRINGMEYER, for Estate of W. O'H. Martin, Incorporated.

FARRINGTON, District Judge:

February 9th, 1903, the Estate of W. O'H. Martin, Incorporated, then owning 300 shares of the capital stock of the Washoe County Bank, surrendered its certificate for cancellation, whereupon two certificates were issued, one for 250 shares to the Estate, and one for 50 shares to H. M. Martin. Martin immediately indorsed his certificate and delivered it to his mother, Mrs. Louise Martin, president of the Estate. Since that date the certificate has been in the possession of the Estate, but on the records of the Bank it still stands in the name of H. M. Martin. The transfer was neither a sale nor a gift, but was made solely for the purpose of qualifying Martin to become one of the directors of the Bank. A few days later he was appointed, and continued to hold the office of director from March 1, 1903, until July 1, 1905. On the original certificate for 300 shares, and on the certificate for 50 shares, the following notice was printed:

> "No transfer of the stock described in this certificate will be made upon the books of the Corporation until after the payment of all Calls

and Assessments made or imposed thereon, and of all indebtedness due to the Banking Corporation by the person in whose name the stock stands on the books of the Corporation, except with the consent in writing of the president." [18]

In November, 1906, more than one year after ceasing to be a director, Martin borrowed $15,000 from the bank, and as security turned over 479 shares of the capital stock of the Nye County Mercantile Company. At that time this stock was believed to be, and probably was, ample security for the loan. Martin testifies that he could have paid this debt at any time before the panic of October, 1907, but never after that event has he been able to do so. The liabilities of the Mercantile Company at the time of the panic amounted to about $80,000, to secure which a mortgage was given on its property, and subsequently foreclosed. Except the first year's interest, nothing was ever paid on Martin's debt to the bank. January 15, 1909, a renewal note for $20,451.64, with interest at 7 per cent per annum, was executed by Martin to the bank in settlement of his original debt. From July, 1903, to July, 1907, inclusive, the dividend checks on the 50 shares of bank stock were issued in the name of, and delivered to, Martin, and by him indorsed to the Estate. From January, 1908, to January, 1911, inclusive, the dividend checks were drawn in favor of Martin, and delivered by C. T. Bender, cashier of the bank, to Fred Stadtmuller, to be mailed to Martin. The instructions were disregarded; the checks were given to Mrs. Martin, and

deposited to the credit of the Estate in the Bank. Martin's name was indorsed on three checks by George H. Taylor, "agent"; on one check by Fred Stadtmuller, "agent"; and on three by Louise W. Martin. Martin testifies that he authorized no one as agent to so indorse his name on the checks. Since January, 1911, the Bank has retained all of the dividends. Cashier Bender was asked by Mrs. Martin in 1909 to transfer the shares of stock on the books of the Bank from the name of H. M. Martin to the Estate; this he refused to do, calling her attention to the notice on the back of the certificate. In July, 1911, the certificate was again presented for transfer. November 12, 1912, a demand was made by the plaintiffs on the Martin Estate to commence suit against the Bank to compel the transfer of the stock. This, also, was refused, whereupon the present aciton was commenced January 13, 1913. It was tried in September, 1914, but not argued or submitted until November 21, 1916.

The value of the 50 shares of bank stock in question is about $7,500. **[19]** The stock of the Estate of W. O'H. Martin, Incorporated, is owned: 7/12 by Mrs. Louise Martin, and 1/12 each by Anna H. Martin, Margaret S. Martin, Carl Martin, plaintiff Clara M. Wight, and plaintiff Gertrude M. Gregory.

Clara M. Wight and Otis B. Wight, her husband, are citizens and residents of Oregon; Gertrude M. Gregory and T. T. C. Gregory, her husband, are citizens and residents of California. The defendants, C. M. Rowland and D. A. Bender, when the suit was commenced, were citizens of California. The re-

maining defendants, including the two corporations, were and are citizens of Nevada. The prayer of the complaint is that the bank be compelled by a decree of this court to retransfer said 50 shares of stock on the books, and to issue to the defendant, Estate of W. O'H. Martin, Incorporated, a certificate therefor, and to pay to said Estate all accrued dividends.

The defendants contend: First, that the Court should not entertain this suit because it is founded on an illegal agreement; second, that the suit is collusive; third, that the Court has no jurisdiction because the case does not exhibit the requisitive diversity of citizenship; and, fourth, that the right of the Bank, arising from the statutes of Nevada, the by-laws of the Bank, and the notice on the back of the certificate in question, to refuse to transfer the stock, is superior to any equity held by the Estate of W. O'H. Martin, Incorporated.

On the hearing of defendants' motion to dismiss the amended bill, it was apparently conceded that it was illegal for Martin to act as director after he had indorsed his certificate of stock, and delivered it to his mother for the Estate. On reflection, I have come to a different conclusion. Viewed with the utmost severity, the transaction cannot be characterized as dishonest, unclean or fraudulent. Martin became a director of the Bank in February, 1903, and ceased to be such July 1, 1905. The debt for which a lien is now claimed was not incurred until November, 1906. During the time Martin served as director no injury or fraud was perpetrated, or sought to be perpetrated; neither does it appear that the stock was

put in his name in furtherance of any fraudulent scheme touching the organization, control, or business of the Bank, as in Bartholonew v. Bentley, 1 Ohio St., 37; or to enable [20] the Estate to avoid any liability, as in Smith v. San Francisco & U. P. Ry. Co., 35 L. R. A. 309. No suggestion has been made that it was illegal for the Estate to own 300 shares of the capital stock of the Bank. The stock at the time was worth $150 per share, or $45.000. It was not at all strange or unbusiness-like in Mrs. Martin, the president of the Estate, and the owner of 7/12 of its capital stock, to desire this interest to be represented in the directorate of the Bank by her son, who was then the acting secretary of the Estate. If the Estate could legally hold 300 shares, it could own and hold 95 per cent of the capital stock. In that event why should public policy restrict the choice at the election of directors exclusively to the persons owning the other five per cent? It seems rather a severe rule which would outlaw for the benefit of the Bank any shares actually owned by the Estate which it may have placed on the corporate books in the name of its agent to qualify him to represent it on the board. A result so serious cannot be permitted, unless the transaction constituted such a violation of the statutes then in force regulating banking corporations in Nevada, that a court of equity must refuse to assist the plaintiffs in their efforts to recover the stock.

It is frequently held that a director of a corporation is an agent, and that he need not be a stockholder unless such a qualification is expressly required in

the charter or by-laws, or by statute. The reasons for requiring an actual, substantial interest, apply with equal force to superintendents and other managing agents, not only of corporate, but of non-corporate business; in such cases a pecuniary interest is not usually required.

21 Am. & Eng. Ency. L., p. 837;
2 Clark & Marshall on Private Corp., sec. 661; Clark on Corp., p. 484;
Wight v. Springfield & N. L. R. R. Co., 19 Am. Rep. 412;
In re Election St. Lawrence Steamboat Co., 44 N. J. L. 529, 541.

In Casper v. Kalt-Zimmers Manfg. Co., 159 Wis. 517, 528, the Court uses this language:

"It is settled by the great weight of authority in this country and in England that one who holds the mere legal title to stock is qualified to act as an officer of the corporation, though there is a charter provision or statute requiring officers to be stockholders. * * * One who holds stock in trust for the express purpose of qualifying him as an officer is eligible. * * *

"A rule requiring that the equitable or beneficial interest in the stock should be in a person in order to render him eligible as an officer would [21] exclude all trustees from acting as corporate officers and in a large measure debar them from investing trust funds in corporate enterprises because they could not adequately protect such funds by participating in the active management of the business. The reason given for

a contrary view is that officers of a corporation should be personally interested in its welfare, and that can be the case only when the legal and beneficial interest unite in the same person. We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office, the person so transferring it is personally interested in the sound management of the corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and is fraught with no undue hazards to stockholders. The defendants mentioned were improperly ousted from office."

In the same effect see:

In Re Leslie, 33 Atl. 954;
State v. Ferris, 42 Conn. 560.

Nothing in relation to the qualifications of a director in the articles of incorporation or in the by-laws of the Bank, has been called to my attention. The Corporation Act of March 10, 1865, as amended in 1875, which was in force during the time Martin acted as director, merely required directors of banking corporations to be stockholders, not stock owners. The provision reads as follows:

"The corporate powers of the corporation shall be exercised by a board of not less than

three directors who shall be stockholders in the company."

Rev. Laws of Nevada, sec. 1223;
Nevada Stats. 1865, p. 359;
Nevada Stats. 1875, p. 68.

This language was copied from a previous Nevada statute originally adopted in December, 1862, and re-enacted by way of amendment in 1864, as follows:

> "The corporate powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders of the company, and a majority of them citizens of the United States and residents of this territory."

Nevada Stats. 1862, p. 163;
Nevada Stats. 1864, p. 50.

Mr. Justice Leonard in State v. Leete, 16 Nev. 246, says that under the act of 1862;

> "A person was considered and treated as a stockholder by corporations if he appeared to be such upon the books of the corporation."

It is also a significant circumstance that the legislature which passed the Act of March 10, 1865, declaring that "trustees * * * shall be stockholders in the company," twelve days later, March 22, 1865, passed an act [22] for the incorporation of railroad companies, in which it was provided that, "No person shall be a director (of a railroad company) unless he shall be a stockholder, owning stock absolutely in his own rights."

It is impossible to escape the inference that the legislature intended this difference, and that actual ownership of stock in banking corporations should not

be a necessary qualification for a director. A subsequent act "to provide for the formation of corporations for the accumulation and investment of funds and savings" (Stats. 1869, p. 149, sec. 6), reads thus:

> "The corporate powers of the corporation shall be exercised by a board of not less than five directors, residents of this State, and a majority of them citizens of the United States, who shall be holders of stock, each of such amount and under such conditions as the by-laws may prescribe, (if a capital is provided for *on* (in) the certificate of incorporation) or members each having deposits with the corporation to the amount of at least one hundred dollars, (if the company has no capital stock.)"

The Banking Act of 1907 (Stats. 1907, pp. 362–3, sec. 5), declares that:

> "The affairs and business of any banking corporation doing business under this Act shall be managed and controlled by a board of directors, or trustees, not less than three, nor more than thirteen in number, who shall be selected from the stockholders in the manner provided in the General Incorporation Act, a majority of whom shall be residents of Nevada."

Finally, in 1911 (1 Rev. Stats. Nev., sec. 625), it was enacted that:

> "No person shall be eligible to serve as a director of any bank organized and existing under the laws of this State unless he shall be a *bona fide* owner of one thousand dollars of the stock

of such bank, fully paid and not hypothecated."

He must also when appointed:

> "take in addition to the usual oath, an oath * * * that he is the owner, in good faith and in his own right of the number of shares of stock required by this act, subscribed by him and standing in his name on the books of the corporation; that the same is not hypothecated or in any *was* pledged as security for any loan or debt."

Throughout the Act of 1865, which was in force while Martin was a director of the Bank, the holder, as well as the owner, of corporate shares was recognized as a stockholder.

The Act of 1911 cannot be understood otherwise than as changing and adding to the theretofore existing law. Fortunately the Supreme Court of Nevada, long prior to the new legislation, found it necessary to interpret the Act of 1865.

In State v. Leete, 16 Nev. 242, a father gave his son certain shares of stock, with a request that a new certificate be issued in the son's name, and [23] proper transfer made on the books of the corporation. This was done. Nothing was paid by the son. The transfer was made in order that the son might be eligible to the office of trustee. The Court held, after a careful review of the statute and authorities, that, "Such a transaction constituted the son a stockholder in the corporation, and made him eligible to the office of trustee," and that under the law of this State a person who holds shares of stock issued in his name, as well as one who owns them, is recognized as a stockholder.

In a later case, entitled Orr Water Ditch Co. v. Reno Water Co., 17 Nev. 168, it was shown that within one month after the trustees of the Water Company were elected, all the capital stock of the corporation was sold, and all its property, personal and real, delivered to George B. Hill, who thereafter had exclusive possession and control. The trustees of the Water Company, though they had disposed of their interests, and of all the property of the company, and in the meantime had made no pretense of acting as trustees, met some three years after the sale and allowed a claim against the Water Company in favor of the Ditch Company. The Court held that when they sold and delivered all their stock to Hill, the trustees ceased to be officers *de jure,* because they were no longer stockholders; and when they met and allowed the account, they were no longer *de facto* officers. As to whether the stock when sold, was transferred on the books of the corporation, the decision is silent. It is impossible to assume in the presence of the finding "that they were no longer stockholders," that the stock still remained on the books of the company in their names. The Water Company attempted to justify the authority of the directors in allowing their claim on no such ground; on the contrary, the argument was *the* inasmuch as the directors had not resigned, they were entitled to hold office until their successors were duly elected and qualified.

I am therefore unable to regard this decison as sustaining the contention that Martin ceased to be eligible to hold the office of director when he returned

the certificate indorsed to the president of the Estate. Under the decision in the Leete case, if Martin had retained possession of the certificate, instead of indorsing and delivering it to his mother, even though he [24] had no beneficial interest, the legality of his election to the office of director could not be questioned.

What, then, was the effect of the indorsement and delivery of the certificate on Martin's right to hold the office of director? The Act of 1865, section 9, provides that corporate stock may be transferred by indorsement and delivery of the certificate, "but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of transfer."

By section 16, the trustees were required to keep a book

> "containing the names of all persons, alphabetically arranged, who are or shall become stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners * * and such book * * shall be presumptive evidence of the facts therein stated in any action or proceeding against the company or any one or more of the stockholders."

Under these statutory provisions, Judge Leonard said the

whole title passes to the transferee, so far as the transferee is concerned, without an entry upon the books; but, as to everybody else, the legal title remains where it was before the transfer."

State v. Leete, 16 Nev. 242, 250.

The Act of 1865, section 5, confers the right to vote for trustees of a corporation on stockholders:

"Each stockholder, either in person or by proxy, shall be entitled to as many votes as he or she may own, or represent by proxy, shares of stock."

Section 11 declares that:

"Whenever any stock is held by any person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder."

There is no attempt in the Act, as in the statutes of some other States, to differentiate stockholders who may vote for directors from stockholders who are eligible to the office of director. Under the Act, if a person was a stockholder for the purpose of voting, he could have been legally elected director. Stockholding was the sole qualification of a trustee. He was not required to be a *bona fide* owner, or the owner of any specified number of shares; nor was it requisite that he should own stock; it was sufficient that he was a stockholder. [25]

Where a person has the right to vote as a stockholder, he is eligible to any corporate office to which

any stockholder is eligible, and accordingly may be elected a director.

2 Cook on Corp., secs. 612, 623.

An executor may be a director even though the stock does not stand in his name.

In re Santa Eulalia Silver Min. Co., 4 N. Y. S. 174, 5.

Schmidt v. Mitchell, 72 Am. St. Rep. 427, 433.

In State v. Pettineli, 10 Nev. 441, 1500 shares of stock in a mining company having been issued to Pitagna, he indorsed and gave the certificate to a friend; prior to the stockholders' meeting the certificate was returned to him. It was objected that he was not entitled to vote. The Court held that inasmuch as no transfer from Pitagni had been made on the books of the company, there could be no valid objection to his voting the stock. In support of this rule, the Court cited the case entitled In re Election of Directors of the Long Island Railroad Co., 19 Wend. 37, where it was held that at an election of directors the right of an individual to vote must be determined by the transfer book of the company; the inspectors cannot look beyond it.

To the same effect see the following authorities:

Peoples v. Robinson, 1 Pac. 156, considering the California Act, in which the Supreme Court of that State construed the Act of 1853 (Wood's Dig., p. 119), from which the Nevada Act of 1862 was copied.

In re Argus Printing Co., 26 Am. St. Rep. 639, 654.

1 Morawetz on Corp., sec. 483.

If the fact that the certificate of stock on the books of the Bank stood in the name of Martin was sufficient to make him a stockholder within the meaning of the statute, he was certainly qualified to become a director of the Bank, even though he had surrendered the certificate to the Estate, and had no beneficial interest in the stock.

In Re George Ringler & Co., 127 N. Y. 938, 204 N. Y. 30, the facts were similar to those in the present case. Certificates of stock issued to several individuals for the sole purpose of qualifying them to serve as directors, were immediately indorsed to the true owners. Thus the only [26] right of the former to be stockholders on directors rested on the fact that their names appeared on the record of the corporation as holders of stock. It was held that they were not qualified to act either as stockholders or directors. Under the by-laws of the company and the law of New York then in force, no one could be a director unless he had a personal pecuniary interest; and a transfer by a trustee of his entire stock worked a forfeiture of his office, and was equivalent to a resignation. The Ringler case, therefore, is not applicable.

In Re Argus Printing Company, 26 Am. St. Rep. 639, 656, 1 N. D. 435, the Court says:

> "It was urged that as Faulkner, subsequently to the issue of the stock, had indorsed it in blank, and left it in the possession of Hill, that he (Faulkner) had ceased to be a stockholder, and therefore had no right to vote the stock or be a director. Under our statute, providing that an

unrecorded transfer of stock shall not be valid for any purpose except between the parties, we are clearly of the opinion, as we have already stated in another connection, that until a transfer should be made on the books, Faulkner would continue to be a stockholder for the purpose of voting the stock or of being eligible to the office of director."

This was said in a North Dakota case. The statute of that State provided that "a stockholder to be entitled to vote, must be a *bona fide* holder, and have stock in his own name on the books at least ten days prior to the election" (p. 648). It was held that the phrase "*bona fide*" was used in contradistinction to "Bad Faith" (p. 651).

People v. Lihme, 109 N. E. 1051, was a proceeding in the nature of *quo warranto,* requiring the defendant to show by what authority he claimed to hold and execute the office of director of the M. & H. Zinc Company, a corporation organized under an Illinois statute, which provided that, "The affairs of such company shall be managed by a board of not less than three nor more than seven directors, who shall be stockholders therein." It appeared that the Hegeler Estate owned about one-half the capital stock of the Zinc Company; this stock had been left by will to Mrs. Carus, a daughter of the testator, in trust for his seven children. She employed Lihme to act as one of the directors of the corporation, and engaged to pay him for such service 15 per cent of the net profits accruing on the trust stock. Accordingly one share of stock was assigned to him, and a new cer-

tificate was issued in his name by the company. He was elected a director, and immediately thereafter indorsed [27] his certificate, and returned it to the trustee, Mrs. Carus, who placed it in a safe deposit box to which Lihme had no access. At the same time he executed an instrument acknowledging that the certificate had been issued to him for the sole purpose of qualifying him to act as a director of the Zinc Company; that he made no claim to the stock, and that it could not be considered as any part of his private estate. It also appeared that from time to time checks were issued in the name of Lihme by the company, covering the dividends on his single share of stock. These checks were not appropriated by Lihme, but were turned over to the trust. It was held that Lihme was a stockholder within the meaning of the statute; that the fact that he had surrendered his certificate to the trustee did not affect his legal title, since there had been no transfer from him to the books of the company; that the fact that he had no pecuniary interest in the stock did not disqualify him to act as a director, and that a director is a mere agent, and need not be a stockholder, aside from the statutory requirements.

It has been urged with much earnestness that the transaction in question is contrary to public policy. It is not easy to define what was the public policy of Nevada in this regard in 1903, 1904 and 1905, but I hesitate to assume that it was in conflict with Nevada statutes then in force, as interpreted by the courts.

Hartford Ins. Co. v. Chicago etc. Ry., 175 U. S. 91, 100.

This disposes of the contention that the case must be dismissed because "Plaintiffs' cause of action arose out of an agreement which is illegal, against public policy, and a fraud upon the stockholders and creditors of the Washoe County Bank, and is such an agreement as precludes the plaintiffs from receiving in a court of equity any relief from a situation created in consequence thereof."

My conclusion is that the transaction was not illegal, fraudulent, or contrary to public policy. Furthermore, there is no evidence that plaintiffs were parties to the alleged agreement, or knew that Martin had indorsed his stock and returned it to the Estate. The equitable rule invoked is, therefore, inapplicable.

It must be assumed that the Martin Estate as a stockholder in the Washoe [28] County Bank was fully aware of the notice printed on the back of the two stock certificates, to the effect that no transfers of stock would be made on the books of the banking corporation until all indebtedness due it from persons in whose name the stock stands on the books of the Bank is paid.

In the present case when Mrs. Martin, as president of the Estate, demanded the transfer of the 50 shares from the name of H. M. Martin to the Estate, Mr. Bender, cashier, called her attention to this notice, and also to the fact that H. M. Martin was indebted to the Bank.

In the complaint it is alleged that it was understood at all times between the Washoe County Bank and the Estate of W. O'H. Martin, Incorporated, that the 50 shares of stock should stand on the books

of the Bank in the name of H. M. Martin only to enable him to become a director, and that the ownership should be and remain in the Estate. The burden is on the plaintiffs to prove this allegation by a preponderance of the evidence.

If a secret trust was created by the Martin Estate, the lien of the Bank on the stock in question is superior to the trust in favor of the Estate, provided the Bank was ignorant of the trust at the time the loan was made; but if the Bank knew that H. M. Martin was holding the stock in trust for the Estate when the loan was made and the Mercantile Company stock taken as collateral security, it could not with any persuasive effect say that the loan was granted on the strength of H. M. Martin's nominal ownership of 50 shares of its stock.

> "It is a well-settled rule in equity that all persons coming into possession of trust property with notice of the trust, shall be considered as trustees, and bound with respect to that special property, to the execution of the trust."
>
> Mechanics' Bank v. Seaton, 1 Pet. 299;
>
> Curtice v. Crawford County Bank, 118 Fed. 390.

The question is, did the Bank have such notice? Notice to its agents was notice to the Bank. As to the knowledge of the Bank, the testimony is conflicting and unsatisfactory. This, however, is not at all surprising when it is considered that the witnesses are testifying from memory in 1915 as to conversations which occurred in 1903.

The testimony as to what was said to or by direc-

tors Manning and Ward was not admitted because they were not living at the time of the trial. The [29] only testimony tending to show knowledge by president and director Mapes was given by Mrs. Louise Martin as follows:

> "Mr. Mapes was very kind; he was very fond of Mr. Martin; he says, 'Yes, we will have Harry on the Board,' and then I says, 'What will I do?' He says, 'You will have to give up some stock, you don't have to give it up, but his name will have to appear on the board as a stockholder.'" (Trans., p. 33.)

Mr. Mapes testified:

> "I stated to Mrs. Martin that no one could be a director of the Washoe County Bank without he owned stock in his own name. Mr. Martin stated to me that she would let him have stock, or give him stock, I would not say which."

Mr. Mapes also testified that until some time after the $15,000 loan was made in 1906, he never knew that H. M. Martin was not the owner of the shares of stock standing in his name, and that prior to the loan he had no intimation or knowledge or suggestion that H. M. Martin was not the true owner of the 50 shares of stock. (Trans., p. 165.)

That he did not know H. M. Martin had indorsed the certificate until he was so informed by T. T. C. Gregory in 1911; that he never consented that H. M. Martin should transfer the stock without paying his indebtedness to the Bank. (Trans., p. 170.) And that unless he had believed that H. M. Martin owned

the stock, he never would have consented to his being a director.

Mrs. Martin also testifies that in 1909, Mapes said to her, "Well, Mrs. Martin, I thought you had made Harry a present of that stock."

The cashier, C. T. Bender, and director Rowland, were equally positive in their testimony that until after the lien was made they had no intimation or knowledge of the fact that H. M. Martin was not the true owner of the stock standing in his name. (Trans., pp. 121, 166, 167.)

During the whole of this transaction George W. Taylor was assistant cashier of the Bank; and from 1905, or thereabouts, to 1909, he attended to Mrs. Martin's business, and acted as secretary of the Martin Estate. (Trans., p. 96.) As a witness he was available to both parties to this litigation. Unfortunately, he was not produced. It does not seem, under the circumstances, that presumptions more unfavorable to one side than to the other can be indulged from this circumstance. **[30]**

> 1 Greenleaf on Evidence (16 ed.), sec. 1956; Jones on Evidence, sec. 21.

Taylor transferred the stock in question from the Martin Estate to H. M. Martin, February 3, 1903. Mrs. Martin testified in relation to this transaction as follows:

> "I told Mr. Taylor that the directors and president of the Bank agreed to put Harry on the board, and I had come to have the certificates renewed in Harry's name—his name had to appear on the books as a director. * * *

He took the old certificate and renewed it in my son's name," and signed it "in my presence, my son's and my daughter's." (Trans., p. 35.)

He then went out and returned with the new certificate signed by Mr. Ward.

"He handed it over to me, and I handed it over to my son to indorse it. We all sat there in the little old directors' room, and finally—we didn't leave the Bank, we were all three together, my son, my daughter and myself, and I wanted it indorsed; my daughter said, 'Mother, you had better have Harry indorse it right away, have it all complete before you put it in the box.' It annoyed my son that I insisted on having the certificate indorsed right away; he felt I was afraid I would not get it back, so he indorsed it, and we put it in the box, and it has been there ever since. Mr. Taylor was still present when the certificate was handed back. (Trans., p. 38.)

Miss Anne Martin testifies that,

"After the stock had been transferred, I said it should be indorsed back, and given back to us at once, and my brother indorsed it in Mr. Taylor's presence, and returned the certificate of stock to us, and it was put back into our security box, which was there on the table." (Trans., p. 6.)

Harry Martin says:

"This certificate for 50 shares was transferred to me—was given to me, and I indorsed it, and returned it to my mother, in the presence of Mr. Taylor." (Trans., p. 82.)

It is certain that Taylor was present in the room when this transaction occurred, but there is no evidence that he participated in the indorsement or in the conversation, that he was an attentive listener, or that anything was said disclosing fully the real nature of Martin's interest in the stock. How much Taylor actually saw or heard we do not know. No utterance of his is in evidence from which the extent of his knowledge can be determined. Having completed the transfer of the stock to H. M. Martin, it is hardly probable that Taylor was alert to hear what was evidently a discussion of the private affairs of the Martin family, his duty as assistant cashier of the Bank did not require him to do so. The indorsement and delivery, even if he saw it, would not necessarily convey to him the information that Martin had no property interest in the shares; Martin may have given the certificate to his mother as security for the performance of some obligation to her, to the [31] family, or to the Estate. The conversations in evidence which indicate knowledge on Taylor's part, did not occur until after the loan was made, and do not establish knowledge prior to that time. The Martin family was not inclined to give any more information as to its private affairs than was necessary.

I am constrained to find that actual knowledge by the Bank prior to the loan to Martin in 1909, has not yet been shown by a preponderance of the evidence.

There is no merit in the claim the Bank may not resist demand for transfer of the stock because its rights are barred by the statute of limitations.

Whatever lien the Bank may have is more like the lien of a pledge than of a mortgage, and in such cases, while the statute may have run against the debt, it does not run against the lien pledge, so long as the pledges retain possession.

4 Thompson on Corp., sec. 4021;
Wood on Limitations, sec. 21;
Hanchett v. Blair, 100 Fed. 817.

When the loan to H. M. Martin was made, the Mercantile Company undoubtedly was in a prosperous condition, and so remained until the panic in October, 1907. Prior to that date the interest on the loan was paid. It probably never occurred to anyone familiar with then existing conditions that the Bank should call in the loan. After the panic was on, it was too late. Creditors of the Mercantile Company demanded its property as security, or payment of their claims. The value of its capital stock shrank practically to the vanishing point. Conceding that Martin was able to pay his debt at any time prior to the panic, under the circumstances there is no equity in the contention that the Bank should be deprived of its loan, if it has any, on the stock in question, simply because it did not foresee the panic, and realize on the Mercantile Company's stock prior to the financial disturbance.

It is contended that this court has no jurisdiction because the real controversy here is between the Bank and the Martin Estate, both of which are defendants; both are Nevada corporations, and consequently citizens of the same State. If the parties are aligned according to their several interests [32]

the Estate should be grouped with the plaintiffs, then requisite diversity of citizenship disappears, and with it the power of the Court to hear and determine the case. Questions as to the sufficiency of the demand, and as to whether the refusal of the Estate to sue can be regarded as a corporate act, are more technical than substantial. At the Martin family council, held in Reno in September, 1912, all of the directors and stockholders of the Estate were present, with possibly one exception; and at least 11/12 of the capital stock was represented. Louis Martin and Anna Martin, who were both directors, and together owned two-thirds of the capital stock, were there. The outcome was a refusal. The two ladies, Louise and Anna Martin, dominated and controlled the Estate. The written notice made by plaintiffs November 19, 1912, demanding that the officers and directors of the corporation cause suit to be commenced in the name of the corporation against the Washoe County Bank for the recovery of the stock within fifteen days thereafter, produced no results. Under such circumstances it was unnecessary to call a meeting of the stockholders, or to wait until an attempt could be made to elect new directors. Such a course would have been futile. It was evident that plaintiffs could obtain no relief within the corporation itself.

Eldred v. American Palace Car Co., 99 Fed. 168;

Beckett v. Planters C. & B. Warehouse Co., 65 So. 275;

Doctor v. Harrington, 196 U. S. 579, 588;

Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435;

Virginia Pass & Power Co. v. Fisher, 51 S. E. 198;

Schoening v. Schwenk, 84 N. W. 916.

The reasons given for the refusal were long connection with the Bank; the fact that W. O'H. Martin had been president of the Bank during the latter years of his life; the publicity of such a suit if brought in Reno; the fear that it would impede the work of Anne Martin, and that the local courts might be influenced by the Bank.

Plaintiffs deny the existence of any agreement or understanding that the Estate should pay the expenses of the litigation. Anna Martin testifies that nothing was said at the family conference to the effect that if the suit were brought by nonresident stockholders the trial could be had in the Federal rather than in the State Court; nothing of the sort was discussed. (Trans., p. 10.) [33]

Mrs. Wight say neither she nor her attorney, Mr. Partridge, stated what they were going to do in case the Estate failed to act; they simply asked that suit be brought; there was no plan. On cross-examination, when asked whether she did not know that she could sue in the Federal Court if the Estate refused to do so, she replied:

> "No, I don't know it, because I hadn't thought anything about it; we simply wanted the suit brought, and brought at once; we wanted the corporation to bring it, and naturally when they refused to bring it, then Mrs. Gregory and I

brought it—demanded that they bring it, and they refused, and then we brought the suit." (Trans., p. 21.)

Unquestionably, the Martin family preferred not to try the case in Reno, or in the local State Courts, but preference for a Federal tribunal, in the absence of fraud and collusion, is immaterial.

City of Chicago v. Mills, 204 U. S. 321;
Smithers v. Smith, 204 U. S. 632, 644.

In its separate answer the Estate admits every material allegation of the amended bill, the prayer of which is that the Bank be compelled to transfer the said 50 shares of stock on its books, and to issue to said defendant, Estate of W. O'H. Martin, Incorporated, a certificate therefor, and pay to said Estate all dividends accrued, or to accrue.

The case presents no issue between plaintiffs and the Estate, except the bare fact of the refusal; otherwise their interests are identical. This fact alone, however, is not sufficient to defeat jurisdiction of this court, nor can it be regarded necessarily as proof of collusion.

Wheeler v. Denver, 219 U. S. 342, 351.

The conditions precedent to bringing a stockholders' suit seem to me to be present in this case. Under the circumstances, the refusal to bring the suit to compel a transfer of the stock, if the directors of the Estate believed, as they evidently did, that the Estate was entitled to the stock, was on their part a breach of their duty, because the refusal would necessarily result in a loss to the Estate, and a proportionate loss to the stockholders who have sought

to protect their interests in the present action. This was sufficient to enable the plaintiffs to sustain an equitable action in their own names.

4 Thompson on Corp., sec. 4553;
Hyams v. Calumet & Hecla Mg. Co., 221 Fed. 529, 542.

The reasons for the refusal by the Estate are not material save as *they* [34] *on* the question of collusion. The effect of the refusal is the same whether it is prompted by legal, illegal, weighty, or trivial motives. In order to protect their interests, if the Estate would not act, the plaintiff stockholders were compelled to do so.

Equity Rule 27 provides for such a contingency by declaring that persons having a community interest must be joined on the same side as plaintiffs or defendants, and when anyone refuses to join, he may for such reason be made a defendant. If the refusal is for an illegal purpose, or in order to carry out a concerted plan to confer jurisdiction on the Federal Court, which otherwise could not have had, it would be the duty of the Court, under section 37 of the Judicial Code, to dismiss the case. Such a course is required whenever it appears that the parties thereto have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in the Federal Court.

In the case of Wowdoin College v. Merritt, 63 Fed. 213, the refusal of the directors who should have commenced the action, was deemed sufficient to support a suit by their *cestui que trust* college.

In Chicago v. Mills, 204 U. S. 321, D. O. Mills, a citizen of California, and a large stockholder in the People's Gas, Light & Coke Company, an Illinois corporation, brought suit to restrain the city from enforcing an ordinance limiting gas rates. Mills had served a written demand on the company to bring such a suit; the company declined to do so on the ground that it would excite public prejudice. After the action was commenced, the company made common cause with Mills. An officer of the company contributed to the expenses, without any understanding that he should be reimbursed by the company. The Court said:

> "We think the record establishes that the complainant and his counsel honestly believed that such new suit was necessary to protect the stockholders' interests. There is an entire lack of testimony to show any collusive action at the time of the beginning of the suit."

The decree of the lower Court in favor of Mills for an injunction was sustained. It was considered that the jurisdiction of the Court must be determined with reference to the attitude of the case at the date of filing the bill. The Court also said the answer of the plaintiff that he understood [35] his suit was brought to confer on the Federal Court jurisdiction in a case of which it would not otherwise have cognizance, would not necessarily show collusion. An examination of the opinion filed in the lower Court, reported at 143 Fed. 430, will contribute to a full understanding of the case. There it was held:

"To sustain the charge of collusion, the evidence must show, either directly or inferentially, that there has been some agreement or understanding between the company and the complainant that the suit should be brought—that Mills was not acting for himself and the other stockholders alone, but was a channel through whom the company, with his acquiescence was reaching out for a footing in the United States courts. Was this the state of things between Mills and the company at the time the suit was brought?

"The fact that the company is beneficially interested in Mills' success, and was, as things have transpired, beneficially interested from the beginning, is not alone sufficient to show this understanding. A stockholder's suit, the company having refused, is always based upon the assumption that the company is interested, and ought, because of that interest in its own name, to have brought the suit.

"The fact that the same counsel was employed by the company in its suit, and by Mills in his, is not alone sufficient to show collusion. * * * Nor is it to be held that because two clients employ the same counsel respecting the same general end, they are in agreement or collusion as to the means of bringing about the end."

In the present case the evidence is insufficient to establish collusion.

Let a decree be entered in favor of defendants.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada.

Clara M. Wight and Otis B. Wight, her husband, and Gertrude M. Gregory and T. T. C. Gregory, her husband, Plaintiffs, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Incorporated, a Corporation, et al., Defendants. Opinion. Filed June 16th, 1917. T. J. Edwards, Clerk. **[36]**

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O.'H. MARTIN, Incorporated, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Decree.

This cause came on to be heard September 4, 1914, upon the amended bill of the plaintiffs, the separate answer of the Estate of W. O'H. Martin, Incorporated, and the answer of the other defendants; the parties appeared in person and by counsel; testimony was taken and thereafter, after briefs were

filed, and on, to wit, November 21, 1916, the same was argued and submitted, and heretofore, to wit, on June 16th, 1917, the Court having fully considered the same made and filed herein its opinion and findings in said cause, from all of which it appears to the Court that the equities alleged in the bill and in the answer of said Estate of W. O'H. Martin, Incorporated, were fully met and denied by the answer of the other of said defendants and are not sustained by the proofs.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that neither the plaintiffs nor the said Estate of W. O'H. Martin, Incorporated, take anything by this suit, and that plaintiffs' bill herein be dismissed, and that the other defendants herein recover from said plaintiffs and said Estate of [37] W. O'H. Martin, Incorporated, their costs herein taxed at $153.85, for which let an execution issue.

Done in open court this 19th day of June, 1917.

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Decree. Filed this 19th day of June, 1917. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for certain defendants. [38]

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please incorporate in the transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, the following portions of the record, to wit:

The Amended Bill of Complaint.

The Answer of All Defendants Except the Estate of W. O'H. Martin, Inc.

The Answer of the Estate of W. O'H. Martin, Inc.

The Opinion and Decree of the Court.

The Petition for Appeal.

The Assignment of Errors.

The Order Allowing Appeal and Fixing Amount of Bond.

The Bond on Appeal.

The Citation on Appeal; and

The Clerk's Certificate.

JOHN S. PARTRIDGE,
Attorney for Plaintiffs and Appellants.

Service of the above and foregoing Praecipe acknowledged and copy received this 25th day of August, 1917.

COLE L. HARWOOD,
By S. R. TIPPETT,
Attorneys for Defendant Estate of W. O'H. Martin, Inc.

Received copy of foregoing this 25th day of August, 1917.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for all Defendants Except Estate of W. O'H. Martin, Inc.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight and Otis B. Wight, Her Husband et al., Plaintiffs, vs. Washoe County Bank, a Corp. et al., Defendants. Praecipe for Transcript of Record. Filed August 27th, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [39]

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. GREGORY, Her Husband,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Petition for Appeal.

To the Honorable E. S. FARRINGTON, District Judge:

The above-named plaintiffs, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 19th day of June, 1917, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith; and pray that their appeal be allowed, that citation issue as provided by law and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals of the Ninth Cir-

cuit, under the rules of Court in such cases made and provided:

And your petitioners further pray that the proper order relating to the security to be required of them on said appeal be made.

JOHN S. PARTRIDGE,
Attorney for Appellants.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Petition for Appeal. Filed August 9, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [40]

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MILLS, Incorporated, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Assignment of Errors.

Come now the plaintiffs in the above-entitled cause and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 19th day of June, 1917:

I. That the District Court of the District of Nevada erred in holding that the defendant, Washoe County Bank, prior to the loan to H. M. Martin, had no notice of the equities of the Estate of W. O'H. Martin, Inc., in and to the fifty shares of stock standing on the books of said bank in the name of Harry M. Martin, for the reasons:

(1) That it appears by a preponderance of the evidence that the said Washoe County Bank had notice, at said time, through its president and director, George W. Mapes, its cashier and director, C. T. Bender, and its director, F. M. Rowland that Harry M. Martin was holding said stock as trustee of said estate of said W. O'H. Martin, Inc.

(2) That it appears, by a preponderance of evidence, that said Washoe County Bank had notice, at said time, through its Assistant Cashier George W. Taylor, that Harry M. Martin was holding said stock as trustee for the Estate of W. O'H. Martin, Inc.

(3) That it appears by a preponderance of the evidence that said Washoe County Bank had notice of the equities of the Estate of W. O'H. Martin, Inc., in and to said stock by reason of the disposition of the defendant's checks on said stock, to wit, their

payment to said Estate of W. O'H. Martin, Inc. [41] by said Harry M. Martin;

II. That the District Court of the District of Nevada erred in holding that the failure of the defendant, Washoe County Bank, to produce George W. Taylor, its Assistant Cashier, as a witness, did not create a presumption unfavorable to said defendant the *the* reason that said George W. Taylor, though available to both plaintiffs and defendant, as a witness, was a person hostile to said plaintiffs.

III. That the said District Court erred in dismissing the bill of complaint herein, for the same reasons hereinabove set forth.

IV. That the said District Court erred in holding that the defendants are entitled to recover any costs herein from the plaintiffs.

V. That the said District Court erred in making and entering its decree herein on June 19th, 1917, in favor of defendants and against plaintiffs, for the same reasons hereinabove set forth.

WHEREFORE, appellants pray that said decree may be reversed and that said District Court of the District of Nevada be ordered to enter a decree reserving the decision of the lower court in said cause.

JOHN S. PARTRIDGE,
Attorney for Appellants.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, Defendants. Assignment of Errors. Filed August 9, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick &

Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [42]

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

Whereas, in the District Court of the United States for the District of Nevada, on the 19th day of June, 1917, a decree was made and entered in the above-entitled cause, in favor of defendants and against plaintiffs; and

Whereas, plaintiffs have on this 10th day of August, 1917, filed their petition for the allowance of an appeal from said decree to the United States Circuit Court of Appeals, Ninth Circuit, together with an Assignment of Errors in and by which said petition they have prayed that an order be made fixing

the amount of the cost bond which they shall give and furnish on said appeal;

Now, therefore, in consideration of the premises and good cause appearing therefor,—

It is ordered that said appeal be, and the same is hereby permitted and allowed and that a certified transcript of all the record proceedings and documents be transferred to said Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal, in form and substance conditioned and with sureties in accordance with the provisions of the law and the rules of practice of this Court, be fixed at the sum of Two Hundred and Fifty ($250) Dollars, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal. [43]

Dated: August 10th, 1917.

E. S. FARRINGTON,
United States District Judge.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, Defendants. Order Allowing Appeal and Fixing Amount of Bond. Filed August 10th, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [44]

In the District Court of the United States in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Bond on Appeal.

Know All Men by These Presents: That we, Clara M. Wight, Otis B. Wight, her husband, Gertrude M. Gregory and T. T. C. Gregory, her husband, as principals, and Massachusetts Bonding and Insurance Company, a corporation organized under the laws of the State of Massachusetts, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto the Washoe County Bank, a corporation, Estate of W. O'H. Martin, Incorporated, a corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herb, George H. Taylor,

A. H. Manning and D. A. Bender, in the full and just sum of Two Hundred and Fifty Dollars ($250), lawful money of the United States, to be paid to the Washoe County Bank, a corporation, Estate of W. O'H. Martin, Incorporated, a corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 18th day of August, 1917.

Whereas the above-named plaintiffs have obtained from the District Court of the United States for the District of Nevada an order allowing said plaintiffs to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse a decree rendered and entered in the above-entitled cause on the 19th day of June, 1917.

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute such appeal to effect and answer all damages [45] and costs if they fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof said plaintiffs, as principals, have executed these presents and said Massachusetts Bonding and Insurance Company, as surety, has caused these presents to be executed by its attorneys in fact thereunto duly authorized, and its corporate

seal to be hereunto affixed this 18th day of August, 1917.

CLARA M. WIGHT,
OTIS B. WIGHT,
GERTRUDE M. GREGORY,
T. T. C. GREGORY,
MASSACHUSETTS BONDING & INSURANCE COMPANY,
By JOHN H. ROBERTSON,
S. M. PALMER,
Attorneys in Fact.

In the presence of
R. C. HUBBARD,
BLAINE B. COLES.

State of California,
City and County of San Francisco,—ss.

On this 22d day of August, A. D. 1917, before me, H. B. Denson, a Notary Public in and for the City and County of San Francisco, personally appeared John H. Robertson, Attorney in Fact, and S. M. Palmer, Attorney in Fact of the Massachusetts Bonding and Insurance Company, to me personally known to be the individuals and officers described in and who executed the within instrument, and they each acknowledge the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the within instrument is the corporate seal of said company, and that said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and

direction of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] H. B. DENSON,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this 21st day of August, in the year one thousand nine hundred and seventeen, before me, M. V. Collins, a Notary Public in and for said City and County residing therein, duly commissioned and sworn, personally appeared Gertrude M. Gregory and T. T. C. Gregory, her husband, known to me to be the persons described in, whose names are subscribed to, and who executed the within and annexed instrument and they acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [46]

State of Oregon,
County of Multnomah,—ss.

Be it remembered, that on this 18th day of August, A. D. 1917, before me, the undersigned, a Notary public in and for said County and State, personally

appeared Clara M. Wight and Otis B. Wight, wife and husband, who are known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year last above written.

[Seal] BLAINE B. BOLES,
Notary Public for Oregon.

My commission expires Jan. 20, 1920.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Bond on Appeal. The Within Undertaking is approved this 23 day of August, 1917. E. S. Farrington, U. S. Dist. Judge. Filed August 23d, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [47]

In the District Court of the United States in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Statement of the Evidence.

BE IT REMEMBERED that on the 4th day of September, 1914, at a stated term of said court begun and beholden in Carson City, in the District of Nevada, before his Honor E. S. FARRINGTON, District Judge, the issue joined in the above-stated case between the parties came on to be heard before the said judge without the introduction of a jury, the plaintiffs being represented by John S. Partridge, Esq., the defendants Washoe County Bank, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Roudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, being

represented by Messrs. Cheney, Downer, Price & Hawkins, and defendant Estate of W. O'H. Martin, Incorporated, being represented by Messrs. Harwood & Springmeyer, and upon the trial of that issue the attorneys for the plaintiffs to maintain and prove the said issue on their part, offered the following evidence, to wit: [48]

Testimony of Miss Anne H. Martin, for Plaintiffs.

ANNE H. MARTIN, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I reside in Reno, and am a resident of the State of Nevada and secretary and director of the Estate of W. O'H. Martin, Incorporated.

I remember a meeting of the directors of this corporation at the office of Mr. Harwood. There were present Mrs. Martin, my mother, Miss Margaret Martin, Mrs. Gregory, Mrs. Wight, John S. Partridge, Judge Harwood and myself. Mrs. Martin was president of the Estate of W. O'H. Martin, Incorporated. Mrs. Wight was a director.

I remember Mrs. Wight and John S. Partridge making a demand on the officers and directors of this corporation to bring this suit. Mr. Partridge made the demand urgent. It was the question at issue between us and we refused to bring suit.

My father's name was Wm. O'Hara Martin. He died September 14, 1901.

At the time of his death he owned certain shares of the capital stock of the defendant Washoe County

(Testimony of Anne H. Martin.)

Bank. These shares were distributed to his heirs according to his will. Shortly after the distribution the corporation known as the Estate of W. O'H. Martin, Incorporated, was formed. The shares in question were transferred to the corporation. I remember the occasion when fifty shares of that stock were transferred to Hary M. Martin. On the occasion of that transfer there were present Mr. George Taylor, my mother, my brother, and myself. Mr. Taylor was at that time the assistant cashier of the Washoe County Bank.

Mr. CHENEY.—(Q.) If the Court please, I desire to enter an objection to any—

The COURT.—I presume that transfer was a matter of record?

Mr. PARTRIDGE.—Yes; I am asking now for the physical facts that happened on that day. I will state in this connection that I am putting Miss Martin on the stand somewhat out of order, because she [49] is engaged in a campaign in this State, and desires to get away immediately, if possible. However, I think that objection is well taken.

Mr. CHENEY.—My objection was—if I might be permitted to state it—that any conversation with Mr. George H. Taylor after the transfer of this stock, is not competent as against the Bank, and constitutes no notice to the bank.

The COURT.—I will allow the testimony to go in subject to the objection.

After the stock had been transferred at that meeting I said it should be endorsed back and given to us

at once, and my brother endorsed it in Mr. Taylor's presence and returned the certificate of stock to us, and it was put back into our security box, which was on the table.

Mr. DOWNER.—If your Honor please, we desire to move at this time to strike out the testimony of Miss Martin, in so far as it relates to the transfer of this stock, and the alleged endorsement of it, and transferring it back, upon the ground that the testimony—

The COURT.—You can state your grounds, and the matter will be passed on finally. Counsel for plaintiffs claims it constituted notice, and I think he is entitled to urge that on the argument; there is no jury here so it makes no difference.

Mr. DOWNER.—All I desire is that we be not deemed to have waived the objection that this was an illegal contract—the contract they alleged in their complaint was an illegal contract, and utterly void. We wish to interpose that objection at this time, to show our position with reference to it.

The COURT.—Of course for the present the motion will be overruled.

Mr. DOWNER.—I suppose and exception may be noted, if your [50] Honor please.

The COURT.—This is simply a *pro forma* ruling.

This meeting took place in the directors' room of the bank.

Cross-examination.

Mrs. Wight and John S. Partridge came to Reno in September, 1912. On the afternoon of the day of

(Testimony of Anne H. Martin.)

their arrival my mother, Mrs. Wight, Miss Margaret Martin, Judge Harwood, my brother Carl, Mr. Partridge and myself were present in Judge Harwood's office. Mr. Partridge and Mrs. Wight were pressing us to bring this suit and we refused to bring it. Mr. Partridge asked us to bring a suit against the bank to recover this stock which belonged to us. Both I and my mother answered him and said we would not bring it. My mother was opposed to bringing the suit and so was I, because we disliked extremely the publicity in having that suit in Reno on account of my father's relations with various men there, and I had a reason too. I did not want the publicity, particularly in Reno, in connection with the work I was doing. My mother gave the first reason that I gave. Nothing was said to the effect that if a suit was brought by a nonresident stockholder the trial would not be held in Reno, but might be held in the Federal court. At the time of the meeting the directors of the Martin Estate Company were Mrs. Martin, Mrs. Gregory, Mrs. Wight and myself. The meeting was not a formal meeting of the board of directors. No formal meeting to take action on this demand was ever had. I was secretary of the company. The stockholders of the company at the time of this meeting were Mrs. Gregory, Mrs. Wight, Margaret Martin, Carl Martin, my mother and myself. So far as I remember, no action was ever asked on behalf of the stockholders.

At the time of the transfer of the fifty shares of stock to Harry Martin, Mr. George Taylor has no re-

(Testimony of Clara M. Wight.)

lation whatever to the Martin Estate Company. I was secretary of the company and my brother Harry [51] Martin kept the books.

I feel now that the suit is a matter of necessity. So far as I know, there has been no agreement by the Martin Estate Company to pay any portion of the cost of prosecuting this suit. I may perhaps have given information to Judge Harwood to assist him in preparing the answer in this case.

Redirect Examination.

Shortly after this meeting, Mrs. Wight and Mrs. Gregory were removed as directors of the Estate of W. O'H. Martin, Incorporated. At the time of the meeting the stock in the estate company was owned as follows: Mrs. Martin seven-twelfths; Anne Martin one-twelfth; Mrs. Gregory one-twelfth; Mrs. Wight one-twelfth; Margaret Martin one-twelfth; Carl Martin one-twelfth. In other words, my mother who was there refusing to bring the suit, represented a majority of the stock.

Testimony of Mrs. Clara M. Wight, for Plaintiffs.

CLARA M. WIGHT, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I reside in Portland, Oregon. My husband's name is Otis B. Wight, a physician. I am a daughter of Mrs. Louise Martin. I remember the occasion in September, 1912, when Mr. Partridge and I went to Reno. We wanted a distribution of the estate, and

(Testimony of Clara M. Wight.)

we went there to talk the matter over with my mother and sisters. A meeting was held in Judge Harwood's office. There were present Judge Harwood, my mother, Mrs. Martin, Anne Martin, Margaret Martin, John S. Partridge and myself. Mr. Partridge and myself asked the others to bring this suit but they refused to do so. They said they would not. As reasons, they said they disliked to bring it on account of our relations, our living in Reno and the notoriety we would gain through it. They said they preferred not to bring it in the State court on account of the [52] feeling which would naturally arise, because the bank was at Reno.

The meeting was held in September, 1912, about the 6th or 8th. In November of that year I signed a demand that they bring suit. The paper shown me is a copy of that demand. (Witness here refers to Plaintiffs' Exhibit No. 1 for Identification.

Cross-examination.

At this meeting I wanted the suit brought and there was a refusal on the part of Anne Martin and my mother. Neither Mr. Partridge nor myself stated what we were going to do in the event they did not bring the suit. I am positive of that. We had no plan to bring a suit at that time. We simply asked that a suit be brought. I understood that a suit could be brought by a minority stockholder in a corporation if the corporation did not itself bring the suit. I did not know anything about my rights in the Federal courts as a nonresident of Nevada.

(Testimony of Clara M. Wight.)

Redirect Examination.

At the time of this meeting, neither Mrs. Gregory, Mr. Partridge nor myself had arrived at any determination of bringing a suit. (Witness is here shown Plaintiffs' Exhibit No. 1 for identification.) It was about the time of the preparation of this demand that we first decided to bring a suit. Prior to the meeting in September, Mr. Partridge and myself did not discuss the right of stockholder to bring a suit in the event of a refusal by the corporation. (Witness is here shown Plaintiffs' Exhibit No. 1 for identification.) It was about that time that we first decided to bring a suit. When I came to Reno on the 9th of September, I do not know that Mr. Partridge had told me that if the Martin Estate Company did not bring the suit that I had the right to bring it. I know, however, that in the event of the Martin Estate Company's refusal there was some other recourse, but Mr. Partridge and I had not discussed that.

Testimony of Mrs. O'H. Martin, for Plaintiffs.

MRS. W. O'H. MARTIN, called as a witness on behalf of plaintiffs, [53] having been duly sworn, testified as follows:

Direct Examination.

In November, 1912, I was the President and a Director of the Estate of W. O'H. Martin, Inc. (Witness is here handed Plaintiffs' Exhibit No. 1 for identification.) In November, 1912 I received a copy of this paper, signed by my daughters, Mrs. Wight and Mrs. Gregory. (Judge Harwood here

(Testimony of W. O'H. Martin.)

produces the original of Plaintiffs' Exhibit No. 1 for identification.) I am familiar with the signatures of Mrs. Wight and Mrs. Gregory. (The original is here handed to witness.) The signatures hereto are the signatures of Mrs. Wight and Mrs. Gregory. This is the paper that I received on or about the 19th of November, 1912.

WHEREUPON Plaintiffs' Exhibit No. 1, being a letter from Clara Martin Wight and Gertrude M. Gregory to the officers and directors of the Estate of W. O'H. Martin, a corporation, dated November 19, 1912, was admitted in evidence and read as follows:

Plaintiffs' Exhibit No. 1—Letter, November 19, 1912, Clara Martin Wight et al to Officers and Directors of the Estate of W. O'H. Martin, a Corporation.

"You and each of you will please take notice that the undersigned hereby demand that within fifteen (15) days from the date hereof, you cause a suit to be commenced in the name of said corporation against the Washoe County Bank for the recovery of the fifty (50) shares of the capital stock of said Washoe County Bank standing in the name of Harry M. Martin, and that within said time you begin such legal proceedings as may be necessary or proper to compel said Washoe County Bank to transfer said shares into the name of said Estate of W. O'H. Martin."

Testimony of Mrs. Gertrude M. Gregory, for Plaintiffs.

MRS. GERTRUDE M. GREGORY, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination. [54]

I reside in San Francisco. The plaintiff, T. T. C. Gregory is my husband, and I am a daughter of Mrs. Martin. At the time subsequent to the 19th of November, 1912, I had a conversation with my mother regarding the written demand that I had made upon her to bring a suit against the Washoe County Bank. I was ill in the hospital, and she came to see me from Nevada. She told me that they had received this demand, and she said that indeed she would not bring suit, did not intend to do anything of the kind, because my sister Anne was in the East, and that she was not going to do anything unless Anne were here. She would not do anything, in fact, unless Anne were here. I remember her telling me that then.

Testimony of Mrs. W. O'H. Martin, Recalled for the Plaintiffs.

Direct Examination.

My husband's name is William O'Hara Martin. At the time of his death he lived in Reno, and was the owner of three hundred (300) shares of stock of the defendant, Washoe County Bank. After his death the stock was distributed to the Estate of W. O'H. Martin, Inc. In 1901, when the corporation was

(Testimony of Mrs. W. O'H. Martin.)

formed, it had the following stockholders: Myself, president, Anne H. Martin, Gertrude M. Gregory, Clara M. Wight, William O'Hara Martin, Arthur Carl Martin and Margaret Stone Martin. Harry M. Martin was never a stockholder of the corporation. Prior to his death, Mr. Martin had been president of the Washoe County Bank for a number of years. I made an appeal to the Bank to have my son represent us on the Board of Directors.

Q. Who did you have that talk with?

A. Oh, I think it was Mr. Mapes, Mr. Bender, Mr. Martin Ward, who has departed, and I can't remember all the names, but there were quite a number; I went among them all, and they were very favorable to my son on the board.

Q. Now, in regard to Mr. Mapes, what was his position in connection with the bank at the time you had this talk with him? [55]

A. President; he succeeded Mr. Martin as president.

Q. What connection did Mr. Ward have?

Mr. CHENEY.—I object to any testimony regarding a conversation had between Mrs. Martin and Mr. Ward, as she has said that Mr. Ward is now deceased, and he being the other party to the transaction, Mrs. Martin is incompetent to testify respecting it.

Mr. PARTRIDGE.—I am not exactly familiar with the statutes of the State of Nevada; is there any statute which forbids the person to testify with regard to talks with deceased persons?

Mr. CHENEY.—When the other party to the

(Testimony of Mrs. W. O'H. Martin.)

transaction is dead, the party is prohibited from testifying—is disqualified.

WITNESS.—There is another gentlemen, Mr. Rowland was very favorable to it, too, he is still living.

Mr. PARTRIDGE.—(Q.) Now, Mrs. Martin, in regard to your conversation with Mr. Bender, what did you say to him about your son becoming a director?

A. Well, we were a little worried, Mr. Partridge; of course we were not represented on the board at all, and we had quite a little at stake in the bank, and I felt quite unsafe not to have a representative in the bank, and so I spoke of my son Harry; I was better satisfied to have a representative, because I was ignorant of business and all, and I thought probably my son could watch my interests; Mr. Mapes said they needed no watching at all, that I would be perfectly safe without being represented, but I wanted to be represented; that was the conversation I had.

Q. Did you tell any one of these gentlemen that you wanted to be represented?

A. Yes, that was my reason for wanting my son on the board.

Q. Do you remember who was the first one of these gentlemen that you told that to?

A. Oh, I went among the directors first; I didn't [56] approach Mr. Mapes first, because I thought I would leave him for the last. I asked Mr. Martin Ward, who has departed, so we cannot have his evi-

(Testimony of Mrs. W. O'H. Martin.)

dence—Mr. Martin Ward, and who were the directors then? Mr. Manning.

Mr. CHENEY.—The same objection applies to Mr. Manning.

A. They are both departed, but they sanctioned it; I had four of them, I had four of the directors on my side.

Mr. CHENEY.—I move to strike the answer out.

The COURT.—That may go out.

Mr. PARTRIDGE.—(Q.) Did you talk to Mr. Bender about it?

A. I don't remember that, I don't think I did.

Q. Did you talk to Mr. Rowland about it?

A. Yes.

Q. What did you say to him?

A. Well, what I said before, that I wanted to be represented; we had considerable stock in the bank, and I felt a little uncertain, you know; there was nobody to represent me; and I wanted to take the other property that was left us, and I wanted a representative; I felt that I had no support.

Q. Did any one of these gentlemen tell you how to proceed, what was necessary in order to have your son become a director? A. Why, yes.

Mr. DOWNER.—Just a moment, Mrs. Martin, I think Mrs. Martin had better be asked to give as near as she can the conversation; not to answer the question as to whether they told her how to proceed, but she should be asked what they said.

The COURT.—I think so. Mrs. Martin, can you tell just what you said, and the reply which was

(Testimony of Mrs. W. O'H. Martin.)

made by the various directors to whom you talked?

A. Yes, they were all very favorable in regard to making my son a director.

Q. You are simply giving the conclusions; we want to know if you recollect just what was said, just the language that was used?

A. I approached them—of course two gentlemen are gone and they [57] cannot testify.

Q. Not those two. The others.

A. I don't think I approached Mr. Bender; and I left Mr. Mapes for the very last, because I thought I would rather handle him the last; so they were all very favorable; I said I felt a little uncertain—shall I repeat the same thing again?

Q. Which one of these gentlemen did you speak with first? A. I think Mr. Manning first.

Q. Which one did you speak to next?

A. Martin Ward, who has departed.

Q. With whom did you speak next?

A. I think Mr. Rowland.

Q. Now do you remember just what you said to Mr. Rowland?

A. Just what I said before; I felt alone, and we had a great deal of money in the bank, and I felt unsafe; I felt I wanted to be represented; I had been ignorant in regard to the money affairs; and all; and I felt better if I could put my son on the board; and the gentlemen were all very nice to me, they were all in accord; they were all willing to put my son on, and there was no trouble there at all.

(Testimony of Mrs. W. O'H. Martin.)

Q. What did Mr. Rowland say, *do remember* the words he said?

A. Yes, he says "I am very fond of Harry Martin," he says, "Mrs. Martin, I will do everything I can for you, I would like him on the board," and all the other gentlemen were the same way, they were very kind to me.

Mr. PARTRIDGE.—If your Honor please, I think under the rule, it is not considered a leading question if the witness' attention is directed to a particular thing—a particular part of a conversation, am I right about that?

The COURT.—Well, I will permit you to do so.

Mr. PARTRIDGE.—(Q.) Mrs. Martin, do you remember whether [58] any one of these gentlemen said anything about the necessity of Mr. Harry Martin being a stockholder?

A. Yes.

Q. Who was it?

A. Mr. Mapes is the only one I approached, and I left Mr. Mapes for the east.

Q. What was it Mr. Mapes said about that point?

A. He said Harry would have to have stock to be represented on the board; it was one Sunday morning, I remember very clearly, my daughter was outside in the carriage; she remained outside, I said, "I will go in and see Mr. Mapes"; I met him at his home, and I told him what I wanted; he was always very fond of my son, and I says, "How will I go ahead, how will I proceed?" and he says, "You will have to turn over some stock to Harry." May I go

(Testimony of Mrs. W. O'H. Martin.)

on about the amount of the shares, and all?

The COURT.—Go on and tell the conversation.

A. We had three hundred shares of stock in the bank; we had one certificate in fifty shares, and the other certificate in two hundred and fifty, and I ignorantly—I didn't want to break up our stock certificate, so I turned that over.

Mr. PARTRIDGE.—You are going a little fast for us.

A. Oh, am I?

Q. What we are trying to get at now is what happened, or what was said between you and Mr. Mapes that Sunday morning when you called at his house?

A. As I said before, he was very favorable to having Harry on the board, and he told me I would have to give up some stock so I could be represented on the board of directors—not to give it, I didn't give it, I just handed it over.

The COURT.—No, just tell the conversation, Mrs. Martin.

A. Well, that is about all. Mr. Mapes was very kind; he was very fond of Mr. Martin; he says, "Yes, we will have Harry on the board," and then I says, "What will I do?" He says, "You will have to give up some stock, you don't have to give it up, but his name will have to [59] appear on the board as a stockholder."

Mr. PARTRIDGE.—(Q.) Did you then proceed to cause any stock to be transferred to his name?

A. I did, yes, fifty shares.

Q. You say the Martin Estate Company had three

(Testimony of Mrs. W. O'H. Martin.)

hundred shares? A. At the time, yes.

Q. Was that in one certificate or two, Mrs. Martin? A. Two.

Q. One certificate for how many shares?

A. Two hundred and fifty.

Q. And the other for what?

A. For fifty shares.

Q. What did you do with reference to those certificates?

A. I don't understand your question. How did I proceed?

Q. Did you cause either one of them to be changed in any way?

A. I did; I have forgotten exactly how soon after the certificates were changed, but I went to the old directors room and had them changed before Mr. Taylor—his name, you know, not changed in the amount, but changed to Harry M. Martin.

Q. Let me ask you this; did you notify anybody what you were going to do, or how did the thing come about? A. Did I do what?

Q. Did you tell anybody what you were going to do, anybody connected with the bank?

A. Yes, they all knew I was going to change it so Harry could represent me on the board.

Q. You went there, did you? A. I was there, yes.

Q. Did you have the two certificates with you when you went there?

A. I went to the deposit box and got this certificate of fifty shares out.

Q. Where was your deposit box?

(Testimony of Mrs. W. O'H. Martin.)

A. Number 92, we have always had the same.

Q. You got one certificate out, did you?

A. Yes.

Q. For how many shares? A. Fifty shares.

Q. What did you do with it?

A. I gave the certificate to Mr. Taylor, Mr. Taylor was present at the time, and made out the certificate; and my son was there, and my daughter Anne Martin.

Q. Don't go too fast for me, I am a little slower than you are. [60]

A. Excuse me, Mr. Partridge.

Q. Did you hand the certificate to Mr. Taylor?

A. Yes.

Q. When you went into the bank, where was Mr. Taylor?

A. Mr. Taylor was in the body part of the bank, but when we came in, I have forgotten to whom I spoke, but we met Mr. Taylor very soon in the director's room, and we got our box out, and took that certificate out.

Q. When you first went in Mr. Taylor was in the body of the bank? A. I think so.

Q. Did you say to him or tell him what you wanted? A. When I met him?

Q. In the outer part of the bank, what did you tell him?

A. I am not positive. I don't think I met Mr. Bender that time; it is quite a long time ago, but Mr. Taylor was present.

Q. What did you tell Mr. Taylor?

(Testimony of Mrs. W. O'H. Martin.)

A. I told him that the directors and president of the bank agreed to put Harry on the board, and I had come to have the certificate renewed in Harry's name— his name had to appear on the books as a director.

Q. Did you hand Mr. Taylor the certificate?

A. I did, yes.

Q. What did he do with it?

A. Why, he took the old certificate, and renewed it in my son's name.

Q. Did that right there in your presence?

A. In my presence, my son's and my daughter's.

Q. Made out a new certificate, did he?

A. Yes. (Witness here produces a certificate. This certificate has never been out of our box since it was endorsed.) I am familiar with the handwriting of Mr. Ward and Mr. Taylor. The signatures on the certificate are those of Mr. Ward and Mr. Taylor.

WHEREUPON, the Plaintiffs' Exhibit No. 2, being a certificate of stock of the Washoe County Bank, was admitted in evidence and read as follows:

Mr. PARTRIDGE.—The certificate reads as follows: [61]

Plaintiffs' Exhibit No. 2—Certificate of Stock of the Washoe County Bank.

"Capital, $500,000.00. Number 171. Shares 50. This certifies that H. M. Martin, of Reno, Nevada, is entitled to Fifty shares of the capital stock of the Washoe County Bank of One Hundred Dollars each, transferable only on the books of the Bank by endorsement and surrender of this certificate after

(Testimony of Mrs. W. O'H. Martin.)

compliance with the conditions printed on its back. Reno, Nevada, Feby. 9th, 1903.

"GEO. H. TAYLOR, A. Cashier. M. E. WARD, Vice-President."

On the back: "No transfer of the stock described in this certificate will be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking corporation by the person in whose name the stock stands on the books of the corporation, except with the consent in writing of the president."

Then there is the signature of H. M. Martin.

Q. I will ask you before I deliver this to the clerk, Mrs. Martin, whether that endorsement on the back is the signature of your son, H. M. Martin? (Hands certificate to witness.) A. It is his signature, yes.

(The certificate of stock is admitted in evidence, and marked Plaintiffs' Exhibit No. 2.)

Q. Now, Mrs. Martin, when Mr. Taylor brought the certificate in the room—

A. (Intg.) Oh, he didn't bring it in the room; he signed it right before us; we were all there, right in the little [62] old directors' room.

Q. Was Mr. Ward there too?

A. No. Mr. Ward was not there; my son, my daughter, Mr. Taylor and myself.

Q. Had he taken it out to be signed by Mr. Ward?

A. Yes, he had; I remember him getting up and leaving his chair, and going out and returning, and handing it to me.

(Testimony of Mrs. W. O'H. Martin.)

Q. And he, himself, signed it there, did he?

A. Yes, right before us; he left that signature to the last.

Q. When he signed it, what did he do with it?

A. He handed it over to me, and I handed it over to my son to endorse it—may I tell what happened?

Q. Yes.

A. I handed it to my son, and he was a little annoyed.

Mr. CHENEY.—This will be considered under the objection as before?

The COURT.—It will go in subject to the same objection urged to the first conversation.

Mr. PARTRIDGE.—(Q.) Now, Mrs. Martin, will you tell us just what happened?

A. We all sat there in the little old directors' room, and finally—we didn't leave the bank, we were all three together, my son, my daughter and myself, and I wanted it endorsed; my daughter said, "Mother, you had better have Harry endorse it right away, have it all complete before you put it in the box"; it annoyed my son that I insisted on having the certificate endorsed right away; he felt I was afraid I would not get it back, so he endorsed it, and we put it in the box, and it has been there ever since.

Q. Will you state whether or not when Harry Martin endorsed that certificate and handed it back to you, Mr. Taylor was still present? A. Yes.

Q. Now, Mrs. Martin, following upon that transaction, will you state whether Mr. Martin, your son, was elected a director of the bank? [63]

(Testimony of Mrs. W. O'H. Martin.)

A. He was elected a director of the bank, the very next week I think he was there with the other directors.

Q. Do you recollect about how long he remained in Reno after that—I refer now to Harry Martin?

A. I think he was a director—he could not have been a director more than two years, until he went to Tonopah.

Q. That would be until what year?

A. He was made a director in 1904.

Q. 1903.

A. 1903, you are right; it was the year my daughter was married, it was 1903, and we were all living in Reno then.

Q. Now, what I want to get is about when he ceased to be a director, if you recollect.

A. I don't remember exactly when his name was taken off the book as a director—he went to Tonopah.

Q. Can you recollect when you left Reno?

A. Yes.

Q. When?

A. That was in the summer, I think it was in May, 1904—1904 or 1905, I am not quite sure, because I remember the year Mr. Taylor was made a director.

There were several dividends declared on these fifty (50) shares of stock while Harry Martin was in Reno, two at least in January and July. I know that Harry Martin never received any dividends on that stock. Up to the year 1909 the dividend checks were sent to my son for endorsement. After he en-

(Testimony of Mrs. W. O'H. Martin.)

dorsed them he sent them back to me, and I took them to the bank immediately and re-endorsed them in the Estate's name, by Louise W. Martin, President, of the Estate of W. O'H. Martin, Inc., across the back.

Q. Immediately after this transaction in 1903, will you state whether or not, Mrs. Martin, you know whether Harry Martin obtained any dividends on the stock? A. Not one.

Mr. CHENEY.—I object, may it please the Court, as to what took place between Harry Martin and the Martin Estate Company [64] unless it was done in such a way it was brought to the notice of the bank, it is not competent evidence.

Mr. PARTRIDGE.—That, of course, would be true, except these are the dividend checks of the bank itself, and we will show they were deposited right back in the bank to the account of the Martin Estate Company.

The COURT.—I will allow you to put in proof, and it will be subject to a motion to strike out if it is not proper.

Mr. CHENEY.—I would like to inquire at this time, where evidence is admitted subject to the objection, whether a motion to strike is necessary in order to preserve that objection?

The COURT.—I don't think so; it will not be, and never has been in such a case. But there is this thought, Judge Cheney, when testimony is admitted in this way. I don't care to have it remain in the record unless my attention is called to it again. If

(Testimony of Mrs. W. O'H. Martin.)

it remains there, and my attention is not called to it, and I fail to pass on it, I shall not allow you an exception.

Mr. CHENEY.—No, I don't suppose it will be necessary to call attention to it by formal motion, if attention is called to it in the argument?

The COURT.—No, it is simply that my attention is called to it; I don't want to overlook the matter, and be found to be in error on a matter on which I have never passed.

Mr. CHENEY.—Oh, no, that would not be fair to the Court.

Mr. PARTRIDGE.—Will you read the question?

(The reporter reads the last question.)

A. He never obtained any dividends on that stock.

Q. Up to the year 1909, do you know of your own knowledge what became of the dividend checks?

A. Up to that time?

Q. Yes. A. You mean up to that time? [65]

Q. Yes?

A. Why, the dividend checks were sent to my son Harry after the meetings, you know, the semi-annual meetings, for endorsement—were sent to Tonopah to my son Harry Martin.

Q. Now, Mrs. Martin, after your son Harry had endorsed them, what did he do with them?

A. Why, he sent them to me, sometimes it was maybe a week he had a check, but he always sent them to me in a letter, enclosed in an envelope, and I took them to the bank immediately and reindorsed them in the Estate's name, by Louise W. Martin, presi-

(Testimony of Mrs. W. O'H. Martin.)

dent of the Estate of W. O'H. Martin, Incorporated, across the back.

Q. When you had so endorsed them, what did you do with them?

A. I handed them either to Mr. Bender or Mr. Taylor, or somebody, but we had credit on the pass-book, or credit on the bank-book, I think that will show.

Q. During that period of time do you know what Mr. Bender's position was in the bank?

A. Cashier.

Q. Did you ever hand these checks personally to Mr. Bender for deposit?

A. I may have handed them to him, or handed them at the window, I can't remember that, but Mr. Bender had seen a number of checks later on.

Q. When later on is it, if you know, that he had seen a number of these checks?

A. When? Do I remember how long later on he had seen these checks?

Q. Yes.

A. Well, he had seen all the checks, I think, that had been sent to the bank, but I don't remember; I could not state exactly how many times I had handed them to Mr. Bender; our relations were very friendly, and I would hand them to him, or hand them in the window; I can't remember exactly how many checks I handed him, or at what time.

Q. Now, Mrs. Martin, do you remember that after 1909, that is, the early part of 1909, that there was any change in the custom of the bank [66] in re-

(Testimony of Mrs. W. O'H. Martin.)

gard to sending the checks to Mr. Martin, and by him endorsing them to you? A. After 1909?

Q. Yes.

Mr. CHENEY.—I desire to interpose the objection, may it please the Court, that is a transaction after the date that Harry Martin became indebted to the bank, and is immaterial as affecting the lien of the bank upon this stock.

The COURT.—I will admit that subject to the objection, if Mr. Partridge insists on it.

Mr. PARTRIDGE.—Oh, yes, I don't see how that can make a particle of difference.

WITNESS.—Shall I answer?

Q. Yes. A. You are speaking of 1909?

Q. Yes.

A. In 1909, I had made a change in our administration, had asked Mr. Taylor to take our affairs over. May I go on further?

Q. Yes, just tell about the dividends.

A. In July, 1909, I went to the bank; I had been east in 1909, and returned in April, and before that I had turned our affairs over to Fred Stadtmuller, who took it over, and everything was all settled; and when I returned in 1909, in July—Fred Stadtmuller, of course, noticed how the stock was standing—may I say this, may I go on with my story?

Q. I think so.

Mr. CHENEY.—Subject to the same objection, if the Court please.

The COURT.—Yes.

WITNESS.—Fred said, "Auntie, I think you had

(Testimony of Mrs. W. O'H. Martin.)

better come over to the bank, I think you had better have that stock transferred; that stock is yours, or your children's and you had better come over."

Mr. PARTRIDGE.—(Q.) Was Mr. Stadtmuller at that time connected with the bank in any way?

A. Oh, yes, he was assistant [67] cashier, I think, or second assistant cashier.

Q. Was he a director then, do you know?

A. No, he was not a director.

Q. Just go on and tell us what happened regarding the dividend.

A. He came over and sat on the porch, and said "Auntie, I think you had better come over and attend to your stock; that stock is still standing in Harry's name, and his creditors know it is in his name; of course the stock is yours." I could not go that very moment, but I went over the next morning, and I saw Mr. Bender inside; I went over and said, "Mr. Bender, I would like to have that stock transferred; that stock is ours, you know it is ours, Mr. Mapes knows it is ours, and I would like to have it transferred." Mr. Bender says, "Mrs. Martin, I could not transfer it, but if you get two-thirds of the board you can have it transferred—that was before the new banking law came in. So it was not transferred; and Mr. Bender at the same time—it was in July—had a dividend check in his hand made out in my son's name, and was going to send it to Tonopah, and I said, "Don't send that to Tonopah, the stock is ours, it is not Harry's, you know that, because I had advanced, or had given or transferred to him

(Testimony of Mrs. W. O'H. Martin.)

some of the stock." So Mr. Bender didn't say a word. After Fred Stadtmuller met me on the porch at noon, and he said—I am getting ahead of my story —I think that same day he telephoned, he says, "Auntie, that check is on your desk, Mr. Bender has put the check in your desk," so I endorsed it.

Q. Will you look at that check, dividend Number 34, dated July 15th, 1909? (Hands check to witness.) A. That is my writing.

Q. Whose endorsement is that on the back of it?

A. That is mine.

Q. I want to make it clear, Mrs. Martin, as to whose handwriting the entire endorsement is in?

A. It is mine.

Mr. PARTRIDGE.—I offer this in evidence, and ask it be marked Plaintiffs' Exhibit No. 3. (Reads:)

[68]

Plaintiffs' Exhibit No. 3—Check, July 15, 1909, on Washoe County Bank.

"Washoe County Bank. Reno, Nevada, July 15, 1909. No. 2279. Pay to the order of H. M. Martin $300.00 Three Hundred Dollars. Dividend No. 34." Signed "C. T. Bender, Cashier." "Endorsed H. M. Martin, Estate of W. O'H. Martin, Inc., by Louise W. Martin, Pres." and marked "Paid."

(The check is marked Plaintiffs' Exhibit No. 3.)

Mr. CHENEY.—I desire to note objection that this is subsequent to the time when the indebtedness arose for which the bank claims its lien, and that any action of the secretary or the cashier of the bank in

(Testimony of Mrs. W. O'H. Martin.)

delivering a check to a person other than the payee, is not binding upon the bank, and constitutes no notice or knowledge or waiver of the bank's lien upon this stock.

The COURT.—That will be admitted subject to the objection.

Mr. PARTRIDGE.—(Q.) I hand you, Mrs. Martin, the next dividend check, dated the 15th of January, 1910, No. 35, and ask if you know in whose handwriting the endorsement is on that check?

A. That is Fred Stadtmuller's.

Q. All of it? A. Yes.

Q. That is all in his handwriting?

A. Yes, all in his handwriting.

Q. Without the stamp?

A. Without the stamp.

Q. At that time was Mr. Stadtmuller connected with the estate of W. O. H. Martin, in any way?

A. No, he was not. What year was that?

Q. January 15th, 1910.

A. Oh, you mean with the bank or with our estate?

Q. With the estate? A. Yes, he was.

Plaintiffs' Exhibit No. 4—Check, January 15, 1910.

Mr. PARTRIDGE.—I offer this check in evidence, and ask that it be marked Plaintiff's Exhibit No. 4. It is a similar dividend check, made to H. M. Martin, dated January 15th, 1910. It is endorsed H. M. Martin per Estate of W. O'H. Martin, Inc., Assignee, Fred Stadtmuller, Agent." There is a further endorsement, "Pay [69] Washoe County

(Testimony of Mrs. W. O'H. Martin.)

Bank, Reno, Nevada, or order, Estate W. O'H. Martin, Inc."

The COURT.—If there is no objection, that will be admitted, with the same limitation as the other.

Mr. CHENEY.—Same objections.

(The check is marked Plaintiffs' Exhibit No. 4.)

WITNESS.—Mr. Partridge, could I ask you what time was that check drawn?

Mr. PARTRIDGE.—That was in January, 1910.

A. I was not in Reno, then, you see, and Fred endorsed those checks, I was not there.

Q. You were away from Reno at that time?

A. Yes.

Q. I will hand you the next dividend check, dated July 13th, 1910, and ask you in whose handwriting the endorsement on that check is?

A. That is my handwriting.

Mr. PARTRIDGE.—I will offer that in evidence, and ask that it be marked Plaintiffs' Exhibit No. 5.

Plaintiffs' Exhibit No. 5—Check.

The COURT.—It will be admitted in the same way.

Mr. PARTRIDGE.—The check is similar, if your Honor please, and is endorsed "H. M. Martin, by Louise W. Martin, Pres. Estate of W. O'H. Martin, Inc., Owner."

Mr. CHENEY.—I would like to make, if the Court please, the additional objection to this last check, that the endorsement is a self-serving declaration, made after the time that Mrs. Martin had demanded the transfer of the stock from Mr. Bender,

(Testimony of Mrs. W. O'H. Martin.)

and the transfer had not been made.

The COURT.—That simply goes to the endorsement?

Mr. CHENEY.—That goes to the endorsement, and I presume that is the only purpose for the introduction, is the endorsement, because the checks, on their face, were all payable to H. M. Martin.

Mr. PARTRIDGE.—That is not the sole purpose of it; the **[70]** check is offered not only for the endorsement, but the fact that the dividend was paid after Harry Martin became indebted to them, and we will show after, as a matter of fact, it was clear the indebtedness could not be collected from Harry Martin.

The COURT.—I will admit it subject to the objection, just as I have other testimony of the same kind, and it can be argued later. As I understand, this testimony goes to the vital issue of the case, if I excluded all this testimony, you would be out of court.

WITNESS.—Could I ask you this question, why I endorsed those checks?

Mr. PARTRIDGE.—We will get to that later, Mrs. Martin. I would like to finish with the checks first.

(Check dated July 13, 1910, is marked Plaintiffs' Exhibit No. 5.)

Q. I now hand you the next dividend check, dated January 14th, 1911, and ask you in whose handwriting that endorsement is? A. That is mine.

Q. That is entirely in your handwriting, is it?

(Testimony of Mrs. W. O'H. Martin.)

A. Everything.

Mr. PARTRIDGE.—I offer this in evidence and ask that it be marked Plaintiffs' Exhibit No. 6.

Plaintiffs' Exhibit No. 6—Check, January 14, 1911.

Mr. CHENEY.—Same objection.

The COURT.—Same ruling.

Mr. PARTRIDGE.—The check is dated January 14, 1911, and is endorsed "H. M. Martin, per Louise W. Martin, Pres. of Estate of W. O'H. Martin, Inc., Owner."

(Check is marked Plaintiffs' Exhibit No. 6.)

A recess is taken at 12 o'clock until 1:30 P. M.

AFTER RECESS—1:30 P. M. [71]

Mrs. W. O'H. Martin, Resuming in Direct Examination.

Mr. PARTRIDGE.—(Q.) Mrs. Martin, I will go back for a moment now, still referring to the dividends on these shares of stock, and I will hand you dividend check of January 19, 1904, and ask you in whose handwriting the endorsements are?

A. Well, the first signature is my son's signature, and the other is mine.

Q. That is in your handwriting? A. Yes.

Mr. PARTRIDGE.—We offer it in evidence, and ask that it be marked plaintiffs' exhibit next in order, which will be number 7.

Same objection and same ruling.

Plaintiffs' Exhibit No. 7—Check, January 19, 1904.

Mr. PARTRIDGE.—I will read only the endorsement, which is that of H. M. Martin, and under it is

(Testimony of Mrs. W. O'H. Martin.)

"Pay to the Estate of W. O'H. Martin, Inc., by Louise W. Martin, President." And there is a stamped endorsement, "Pay to the order of Washoe County Bank, Reno, Nevada, The Nevada National Bank of San Francisco. Geo. Grant, Cashier."

Q. Do you know where that check was deposited, Mrs. Martin?

A. That must have been deposited in the Nevada National Bank.

Q. In San Francisco? A. Yes.

Q. Do you remember whether it was done by yourself or not?

A. By myself, I think; I am pretty certain I deposited all those checks.

(Check dated January 19, 1904, is marked Plaintiffs' Exhibit No. 7.)

Q. I hand you the next dividend check of July 13, 1904; in whose handwriting are the endorsements on that?

A. Harry M. Martin, and my own endorsement.

Plaintiffs' Exhibit No. 8—Check, July 13, 1904.

Mr. PARTRIDGE.—It is endorsed "H. M. Martin, Estate of W. O'H. Martin, Inc., by Louise W. Martin, President." I offer it, and ask that it be marked next in order.

(The check is marked Plaintiffs' Exhibit No. 8.)

[72]

The COURT.—You might hand all those checks to the witness and offer them all together. I presume it will be the same objection to each one.

Mr. PARTRIDGE.—I will do that, your Honor.

Plaintiffs' Exhibit No. 9—Check, July 12, 1905.

(Q.) That particular check, referring to the one of July 12, 1905, that is your handwriting?

A. That is my signature.

Mr. PARTRIDGE.—The same offer.

(The check is marked Plaintiffs' Exhibit No. 9.)

(Q.) I hand you a number of dividend checks, one dated July 11, 1906, one July 10, 1907, January 15, 1908, and January 15, 1909, and ask you in whose handwriting the endorsement to those checks are? (Hands to witness.)

A. One is my son's, and the other is Mr. Taylor's.

Plaintiffs' Exhibit No. 10—Check, July 11, 1906.

Q. On the check of July 11, 1906, the first endorsement is that of your son, Harry Martin, and the other, "Deposit Estate W. O'H. Martin, by Geo. H. Taylor," is by Mr. Taylor, is it? A. Yes.

Mr. PARTRIDGE.—The same offer in regard to that.

(The check is marked Plaintiffs' Exhibit No. 10.)

The COURT.—Is there any question that those checks were signed by the parties by whom they purport to have been signed?

Mr. PARTRIDGE.—Not that I know of. Some of them where the name Harry Martin purports to have been signed by him, but these that we have gone over are all signed by Harry M. Martin.

Q. Those checks that I have handed you, Mrs. Martin, in whose handwriting are the endorsements? A. This one is Harry's and Mr. Taylor's.

(Testimony of Mrs. W. O'H. Martin.)

Plaintiffs' Exhibit No. 11—Check, July 10, 1907.

Q. That is referring to the check of July 10, 1907, the endorsement is by H. M. Martin, and then by Mr. Taylor? A. Yes.

Q. By the way, at this point I want to ask you whether or not this is the same Mr. Taylor whom you testified was present as assistant [73] cashier of the bank at the time this transfer of stock was made? A. The same gentlemen, yes.

(Check of July 10, 1907, offered in evidence, and marked Plaintiffs' Exhibit No. 11.)

Q. Now, the remaining three checks, the endorsements are in whose handwriting?

A. Mr. Taylor's; these were endorsed at a time when I was not here.

Plaintiffs' Exhibit No. 12—Recital Re Check Dated January 15, 1908, and July 15, 1908.

Mr. PARTRIDGE.—I will offer in evidence these checks, dated January 15, 1908, July 15, 1908, and January 15, 1909. They are all endorsed in the handwriting of Mr. Taylor "Deposit Estate W. O'H. Martin, Incp. H. M. Martin by Geo. H. Taylor."

(The three checks are marked Plaintiffs' Exhibit No. 12.)

Plaintiffs' Exhibit No. 11—Recital Re Check Dated January 11, 1905, and July 13, 1903.

Q. Here are two checks, one dated January 11, 1905, one July 13, 1903, whose is the signature upon the endorsement of those two checks?

(Testimony of Mrs. W. O'H. Martin.)

A. Harry Martin on both of them.

(The two checks are offered in evidence and marked Plaintiffs' Exhibit No. 11.)

Q. Now, the remaining three checks, the endorsements are in whose handwriting?

A. Mr. Taylor's; these were endorsed at a time when I was not here.

Plaintiffs' Exhibit No. 12—Check.

Mr. PARTRIDGE.—I will offer in evidence these checks, dated January 15, 1908, July 15, 1908, and January 15, 1909. They are all endorsed in the handwriting of Mr. Taylor "Deposit Estate W. O'H. Martin, Inc. H. M. Martin. By Geo. H. Taylor."

(The three checks are marked Plaintiffs' Exhibit No. 12.)

Plaintiffs' Exhibit No. 13—Recital Re Check Dated January 11, 1905, and July 13, 1903.

Q. Here are two checks, one dated January 11, 1905, one July 13, 1903, whose is the signature upon the endorsement of those two checks?

A. Harry Martin on both of them.

(The two checks are offered in evidence and marked Plaintiffs' Exhibit No. 13.) [74]

Plaintiffs' Exhibit No. 14—Recital Re Check Dated January 10, 1906.

Q. Handing you a check of January 10, 1906, is that the signature of your son and of Mr. Taylor?

A. Yes, my son and Mr. Taylor.

Mr. PARTRIDGE.—The same offer.

(The check is marked Plaintiffs' Exhibit No. 14.)

(Testimony of Mrs. W. O'H. Martin.)

Plaintiffs' Exhibit No. 15—Recital Re Check Dated January 9, 1907.

Q. Handing you check of January 9, 1907, is that the signature of your son, H. M. Martin?

A. Yes.

Q. And the word "Account" Estate W. O'H. Martin? A. Is Mr. Taylor's.

Mr. PARTRIDGE.—Same offer in regard to that.

(The check is marked Plaintiffs' Exhibit No. 15.)

After July 15, 1911, I received no further dividends on this stock. After the transfer of the stock to Harry Martin, and prior to January 15, 1909, the dividend checks were sent to Harry Martin at Tonopah, and after a week or two Harry endorsed them and sent them to me at Reno. I endorsed them in the name of the Estate of W. O'H. Martin, Inc., by Louise W. Martin, Pres., and took them to the bank and deposited them. I could not say to whom I gave them at the window. Probably Mr. Bender may have been at the window once in awhile, but they were taken to the bank and deposited. At the time that I told some of the gentlemen of the bank that the stock ought to be transferred. The first dividend check that I received Mr. Bender was on the point of sending to my son, and I said: "Mr. Bender, please don't send that check. That stock is ours." And in the afternoon Mr. Stadtmuller told me that the check was on my desk and that Mr. Bender had left it there. It was endorsed by my son, because he had not received it. I endorsed it in the name of the Estate, by

(Testimony of Mrs. W. O'H. Martin.)

Louise W. Martin, and gave it to the bank to the credit of the Estate. After that time and up to July, 1911, these dividend checks together with the other check for our two hundred and fifty (250) shares came through the mail to my box at the post-office. One was made out for $1,500 and the other was made out for $300, and they were both sent, together, **[75]** to the Estate of W. O'H. Martin. The letters were addressed, "Estate of W. O'H. Martin, Inc., Reno, Nevada." This court of dealing applies to all of the checks that subsequent to January are endorsed either by myself or by Mr. Taylor.

Q. Now, Mrs. Martin, you testified this morning that you requested the officials of the bank to make that transfer; can you recollect what month in 1909 that was?

A. I think I had been east that year; I think it was the month of July, just before the dividends were paid.

Q. And to whom did you speak about the matter at that time? A. At that time?

Q. Yes.

A. Well, that was about the same time that I received that check that Mr. Bender didn't send to Tonopah; he was right inside of the railing, and I asked Mr. Bender, told him I would like to see him about this matter of transferring the stock to the estate, to whom it rightly belonged, and Mr. Bender, said, "Mrs. Martin, I can't transfer it myself, but if you will bring it before the board, or get two-

(Testimony of Mrs. W. O'H. Martin.)

thirds of the vote of the board, we probably could transfer it," and that went right on for a long time before anything was done.

Q. In regard to that occasion when you spoke to Mr. Bender, did Mr. Bender in anywise deny that it was the stock of the estate? A. No.

Mr. DOWNER.—This is objectionable, and we move to strike out the answer, because they allege in their complaint the demand was made some time in the year 1911. We are not called upon to meet a demand made in 1909, because plaintiffs don't bring it in their case at all. We are here to meet simply the allegations of the complaint, and there is no allegation that any demand was made until 1911 by the complaints in this case.

Mr. PARTRIDGE.—The evidence is not offered for the purpose of showing a demand, that we will establish at the time we allege, namely, in July, 1911; but the testimony is offered for the **[76]** purpose, and sole purpose, of showing that as early as July, 1909, at least that officer of the bank knew that it was the stock of the Martin Estate Company, and that when Mrs. Martin stated to him that it was the Estate's stock, he did not say that it wasn't.

The COURT.—I will admit the testimony. I suppose it may be admitted in the same way as the other, it all goes to the same issue.

Mr. CHENEY.—Subject to the objection, I understand.

The COURT.—Subject to the objection.

(Testimony of Mrs. W. O'H. Martin.)

(By direction the reporter reads the last question.)

Mr. CHENEY.—That is objected to on the ground it is leading.

Mr. PARTRIDGE.—Well, it is. I will withdraw it.

Q. Did Mr. Bender say anything else in regard to that stock, except what you have already testified to?

A. Yes, he did say something else; I wanted that stock transferred, and he went to—I think he had a blank certificate, and he showed me the words that were written on the back, the agreement if anybody was indebted to the bank, why, that stock could not be transferred. Of course we were not indebted to the bank. He said of course he could not do it alone, but it could be brought before the board; and time went on, and nothing."

After the talk with Mr. Bender, and during the month of September, or the end of August, I had a talk with Mr. Taylor and asked him if anything had been done in regard to the transfer of the stock, and he said that it had not, but that he thought it would be advisable to write a letter to the board, which I did.

During all these negotiations, and up to July, 1911, neither the bank nor any official communicated to me a refusal to transfer the stock.

During the years 1908 and 1909 Mr. Taylor was keeping the books [77] for the Martin Estate Company, taking care of our estate, and was also

(Testimony of Mrs. W. O'H. Martin.)

assistant cashier of the Washoe County Bank. I don't think he was a director then.

Q. Mrs. Martin, do you remember one evening at your house when Mr. Taylor came there, and when your son Carl was present, having a conversation at that time and place in the presence of your son Carl, with Mr. Taylor with reference to this stock? A. I do.

Q. Will you relate what was said?

Mr. DOWNER.—One moment—I would like to have the date, as near as you can give it.

A. September.

Mr. PARTRIDGE.—(Q.) That was in September, 1909? A. Yes.

Q. Will you relate what that conversation was?

Mr. DOWNER.—We object on the ground that there is no showing that Mr. Taylor was such an official of the bank that any notice was imputed to the bank through him.

The COURT.—That objection will be noted, and the testimony will be admitted subject to the objection. I suppose that will apply to some other questions, too?

Mr. DOWNER.—Probably.

Mr. CHENEY.—Of course that objection has been made several times.

Mr. DOWNER.—That objection has been made; it applies to other matters, and it has been saved before.

The COURT.—It has been saved before, that was this morning some time. It all goes in, but of

(Testimony of Mrs. W. O'H. Martin.)

course I would like to know what your objections are; it is only fair to the other side that they should know just what your objections is. If, Mr. Partridge concluded that the objection was good, he might be in a position now to correct it. **[78]**

Mr. PARTRIDGE.—I understand, gentlemen, your objection to communications to Mr. Taylor's statements is based upon the proposition that he was not such an officer of the bank that communications made to him would be notice to the bank, nor would his admissions bind the bank; is that correct?

Mr. CHENEY.—Also on the proposition that Mr. Taylor at that time, especially at the time of the last communication, occupying a position of confidence and trust with the Martin Estate as its agent, is not presumed to have communicated the business of his principal to the Washoe County Bank, because such a communication by him would be in violation of his duty to the Martin Estate Company.

The COURT.—This objection does not apply to Mrs. Martin's testimony with reference to these signatures, or the endorsement that was made by Mr. Taylor while Mrs. Martin was away from Reno, does it?

Mr. CHENEY.—Oh, no, because that only went to the genuineness of his signature; there is no controversy about that.

The COURT.—Do I understand those checks were offered to show notice also?

Mr. PARTRIDGE.—Oh, yes, your Honor; that was one of the main objects.

(Testimony of Mrs. W. O'H. Martin.)

Mr. DOWNER.—They were offered under objection, and at the same time Mrs. Martin herself stated —which brings it within the objection now made by Judge Cheney, as I understand it—that Mr. Taylor was acting for the Martin Estate at the time he endorsed those checks; so we certainly desire to have the objections go to the entire testimony concerning Mr. Taylor, either by conversations with him, or by alleged endorsements that he is supposed to have made.

Mr. PARTRIDGE.—That is only fair, and I consent it be considered that objection was made to the endorsements. [79]

Mr. CHENEY.—May it be considered that any testimony offered in reference to conversations between any of the representatives of the Martin Estate and Mr. Taylor, be subject to this same objection.

Mr. PARTRIDGE.—That is, any that have been so far offered; I don't like to admit that for the future, but to the past I consent that objection be made. It is understood that we consent to that.

Mr. CHENEY.—Hereafter we will make our specific objections. (By direction the reporter reads the last question.)

WITNESS.—In the year 1909?

Mr. PARTRIDGE.—Yes.

A. Well, I telephoned to Mr. Taylor that I wanted to see him at the house, and he came over—this worried me in the start, and he came over, and I approached him, and I said, Mr. Taylor—I think I have repeated this, haven't I?

(Testimony of Mrs. W. O'H. Martin.)

Q. Not this particular conversation you have not.

A. When my son Carl was present?

Q. Yes.

A. Well, it was to this effect, Carl spoke up first, and he said, "Mr. Taylor, why don't they transfer that stock to the estate, that stock belongs to us, you know it belongs to us, and the bank directors know it belongs to us," then he went on to say that I should —No, he told me—we discussed this—I have repeated this before, haven't I, about this discussion in 1909?

Q. No, for your information, gentlemen, I will remind her; do you remember his saying anything about what he had told the directors about it?

A. Yes, I do—I have gotten back again.

Mr. CHENEY.—I object to that on the ground it is incompetent, and irrelevant; that what he may have told the directors unless it was when the board of directors were present and assembled in considering this matter, is not notice to the bank; and it is not shown that Mr. Taylor at the time of making these statements, either to Mrs. Martin or the purported statements to the board of directors, was in a position to represent, or that notice to him constituted [80] notice to the bank.

The COURT.—It will be the same ruling.

WITNESS.—I may go on?

Mr. PARTRIDGE.—Yes, go ahead.

A. We were sitting there, and Carl said, "Mr. Taylor, why doesn't the bank transfer that stock? They know that stock is ours, and why do they bother mother so much about it?" Mr. Taylor

(Testimony of Mrs. W. O'H. Martin.)

turned around and said, "I know that stock is yours, Mrs. Martin, but I cannot transfer it alone." And so he said he would of course bring it before the board, what was to be done; that was in 1909. And, as I said, Carl had said that he knew the stock was ours, and I knew the stock was ours, but could not have it transferred; and he said this, too, that night, if it ever came to a lawsuit, he would have to testify for the W. O'H. Martin Estate—that night he said it."

Cross-examination.

At the time Mr. Harry Martin was elected a director of the bank in February, 1903, he filled a vacancy left by the death of Mr. D. V. Lyman. I had talks with four different members of the Board about Harry filling Lyman's place. In my talk with Mr. Rowland and the others, they all expressed approval of Mr. Harry Martin. They explained to me that Harry would have to have some stock to be represented on the Board. I do not remember that they told me the precise amount.

Q. Did Mr. Rowland or Mr. Mapes, the two with whom you talked who are now living, ever give you to understand in any way, Mrs. Martin, that Mr. Harry Martin could be a director of the bank unless he owned stock?

A. They never gave me to understand at all, only that he must be represented on the books." We had two hundred and fifty (250) shares in one certificate and fifty (50) in the other, and I turned over

(Testimony of Mrs. W. O'H. Martin.)

the fifty share certificate to Harry Martin for convenience. [81]

Q. That is, your stock at that time stood one certificate for two hundred and fifty shares, and one at fifty, and it was convenient to take the one and transfer it to Harry Martin?

A. Yes, I was stupid about it.

Q. And if it had not been for the fact that the shares were in those amounts, two hundred and fifty and fifty shares—the certificates—you would have simply given Mr. Harry Martin, as you say, sufficient to have qualified him to act as a director in the bank, would you?

A. That is all, yes. I should never have given up the two hundred and fifty shares to qualify, but that fifty shares was there, and—''

At the time of the transfer of the fifty shares of stock to Harry Martin there were present Miss Anne Martin, myself and Mr. George Taylor. After Harry put his name on the back of the certificate I took it.

Q. How was it endorsed, and state what was done at the time of its endorsement?

A. It was endorsed just across the back, ''Harry M. Martin,'' in the presence of Mr. Taylor.

Q. Then what was done with it?

A. I deposited it in our box.

Q. It was given to you, was it? A. Yes.

Q. By whom?

A. Given to me by my son after he endorsed it.

(Testimony of Mrs. W. O'H. Martin.)

Q. And you took it and put it in the safe deposit box?

A. I took it and put it in the safe deposit box."

Q. What is the reason if he ceased to be a stockholder, or didn't own that stock, you didn't immediately have the secretary of the company issue a new certificate for those fifty shares?

A. Because I had talked to Mr. Taylor about it several times, and Mr. Taylor had said that it was fully endorsed, and that it was all right as it was.

Q. You knew then that it was necessary for certificates to [82] stand in the name of Mr. Harry Martin in order to qualify him as a director, did you?

A. Mr. Mapes told me that, yes.

Q. And therefore, as I understand, you made a transfer of stock to him, not as owner at all, but simply to permit certificates to stand in his name in order to qualify him as a director?

A. That was the object. Mr. Martin died September 14, 1901, and Harry Martin removed from Reno to Tonopah in 1904, and after that time we continued to keep this fifty shares of stock in our safe deposit box."

July, 1909, was the first time I asked for a transfer of these shares of stock. I waited all that time because Mr. Taylor had told me that the stock was fully endorsed. I have letters to that effect, and it was left that way, and I thought it was perfectly safe as it was.

(The witness' attention is directed to a check

(Testimony of Mrs. W. O'H. Martin.)

dated July 14, 1903, attached to Plaintiffs' Exhibit No. 13.)

"This check is made payable to the order of H. M. Martin by him and by nobody else." I got the money on this check. I must have intended to endorse it when the check was given. I did not endorse it, but it was paid. I am not mistaken in the fact that I got the money on that. I received every check from that time until 1911.

(Witness' attention is directed to a check dated July 11, 1905, attached to Plaintiffs' Exhibit No. 13.)

I got the money on this check.

(Witness' attention is here directed to the Plaintiffs' Exhibit No. 4, and check dated January 15th, 1910.)

Fred Stadtmuller, who is my nephew, at that time had charge of our affairs. I do not know why Fred Stadtmuller endorsed this check as assignee. I have attended several meetings of the stockholders of the Washoe [83] County Bank since July, 1903, as representative of the Martin Estate Company. I do not remember what occurred at the meeting of July 14, 1903, nor what occurred at the meeting of the stockholders on August 9, 1904, nor what occurred at a meeting of the stockholders on July 1, 1905, nor what occurred at a meeting of the stockholders on July 10, 1906. As to the stockholders' meeting of July 9, 1907, I do not remember who represented the fifty shares of stock at that meeting. I think Mr. Taylor may have had the proxy. I have no recollection of what occurred at the meeting of July 14,

(Testimony of Mrs. W. O'H. Martin.)

1908. The Martin Estate Company was not represented at that meeting. At the meeting of July 13, 1909, I had a proxy for H. M. Martin.

Q. Do you remember a meeting of July 12, 1910?

A. 1910, I was not in Reno.

Q. July 12, 1910? A. No, I was in California.

Q. On July 12th; then it is not true that at that time the Martin Estate was represented by Mrs. Martin, 250 shares, and that the fifty shares in the name of H. M. Martin was represented by Martin Estate proxy?

A. Mr. Taylor must have had that stock, both of the proxies, because I was not in Reno at that time, I was in California in 1910.

Q. You were not here?

A. No, I was not here.

Q. Then you were not present at that meeting?

A. No. As far as I can recollect, Mr. Stadtmuller attended the stockholders' meeting of July 11, 1911. I never heard before that the stockholders only allowed Mr. Stadtmuller to vote 250 shares at that meeting.

As to the conversation between myself and Mr. C. T. Bender, in July, 1909, I asked Mr. Bender if that stock could not be transferred, and he said he would like to do it, but I would have to get a two-thirds' vote of the Board. He told me that Mr. Harry Martin was [84] indebted to the bank, and he said that the reason why the bank would not transfer the stock was because it stood in Harry Martin's name, and I replied, "Mr. Bender, that stock is not

(Testimony of Mrs. W. O'H. Martin.)

Harry's, and you know that stock is not Harry's. You know that stock belongs to the Estate." Mr. Bender made no reply to this. He did not say, "Mrs. Martin, you are mistaken. I never knew any such thing, and the stock was always Mr. Harry Martin's." I did not know that my son, Harry, was indebted to the bank until I sent Mr. Taylor to Tonopah in January or February, 1909. I never knew my son was indebted to the bank until I had sent Mr. Taylor out to Toonpah, that was in 1909; I sent Mr. Taylor out there at my expense; I didn't know the condition of my son's business; we were interested in that business, and I was a little anxious about it, and Mr. Taylor went out, and he brought back figures; and after he returned he told me my son was indebted to the bank; that was the first time I ever knew that the bank had an indebtedness against him, in 1909. I think Mr. Taylor told me the amount of the indebtedness was $17,000.00 and that no interest had been paid.

Q. There was one thing I omitted about the conversation with Mr. Bender in July, 1909, Mrs. Martin; you said something about Mr. Bender reading you something that was on the certificate?

A. Oh, he read something about the endorsement, anybody that held stock in the bank, if they were indebted to the bank, the stock could not be transferred; and he even told me that Mr. Martin had had that put on the back of the certificate, and I said, "Mr. Bender, that is all right to people who are owing you, but as long as this stock is ours, and we

(Testimony of Mrs. W. O'H. Martin.)

don't owe, that does not affect me at all," that was the conversation—he brought out a blank certificate, that was all."

The only reason why I permitted the stock to stand on the books of the [85] bank in Harry Martin's name was to qualify him as a director.

The reason that I did not have the stock re-transferred when Harry ceased to be a director was because I was told the stock was perfectly safe as it was. Mr. Taylor had always told me it was just as safe that way.

Testimony of Mr. Harry M. Martin, for the Plaintiffs.

HARRY M. MARTIN, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I reside in San Rafael, California, and am a son of Mrs. Martin. I recollect the transfer of stock which took place in the director's room of the Washoe County Bank. There were present my mother, my sister Anne Martin, and Mr. Taylor. In the presence of Mr. Taylor this certificate for fifty shares was given to me, and I endorsed it and returned it to my mother. Excepting during the time of the meeting the certificate was never at any time in my possession. I was elected a director at the next regular monthly directors' meeting. I remained a director until 1905. During the years I acted as a director, I received *I received* dividend checks on the fifty

(Testimony of Harry M. Martin.)

shares of stock which I endorsed and either gave them to my mother for the estate, or mailed them to her. I never received any money on these dividend checks. After I ceased to be a director I went to Tonopah—this was in May or June, 1905—and engaged in business in mining supplies. I bought 49% of the capital stock of the Nye County Mercantile Company, a corporation. While I was in Tonopah I received dividends on the fifty shares of stock, which I mailed to the Estate of W. O'H. Martin.

I remember writing to Mr. Taylor, of the Washoe County Bank about a loan. He was Assistant Cashier of the Bank at that time, and in this letter I told the bank that I would like to borrow a certain sum of money with my security of the stock of the New County Mercantile [86] Company. I think I asked for a loan of $20,000 and received an answer from Mr. Taylor, who told me it would be satisfactory. I drew a check on the Bank for that amount, and endorsed and sent with the check my stock in the Nye County Mercantile Company.

(The witness is here shown Certificate No. 20 of the Nye County Mercantile Company.)

That is the Certificate of Stock to which I refer. The endorsement on the back "H. M. Martin" is my signature.

WHEREUPON Plaintiffs' Exhibit No. —— was admitted in evidence and read as follows:

STATEMENT BY MR. PARTRIDGE.—"I will now, with your consent, read the entire certificate. It is Certificate No. 20 for 479 shares of stock of the

(Testimony of Harry M. Martin.)

Nye County Mercantile Company, of Tonopah, Nye County, Nevada, in the name of H. M. Martin. Par value $100 a share, and endorsed by H. M. Martin. The date of the certificate is September 22, 1905."

(Defendants' counsel then produced a note of H. M. Martin for the sum of money borrowed by him.)

WHEREUPON the said note was admitted in evidence and marked "Plaintiffs' Exhibit No. ——, and read as follows:

Plaintiffs' Exhibit No. ——, Certificate of Stock No. 20 of Nye County Mercantile Co.

"$20,451.64.

"Tonopah, Nevada, January 15, 1909.

"One day after date, without grace, for value received, I promise to pay to Washoe County Bank, Reno, Nevada, at its banking office in Reno, Nevada, or wherever payment shall be demanded in the State of Nevada, California, or elsewhere, at the option of the holder hereof, $20,541.64; in United States Gold Coin; with interest in like gold coin, payable monthly, at the rate of 7 per cent per annum from date hereof until paid. The makers and endorsers hereof waive demand, protest, notice and diligence, and I further promise that if this note is not fully paid at maturity, I will pay all costs and expenses, [87] including a reasonable attorney's fee, that may be incurred in collecting this note, or any part thereof.

"H. M. MARTIN."

The number I cannot make out. I will omit that; I suppose it is of no consequence.

(Testimony of Harry M. Martin.)

"Having executed and delivered to the Washoe County Bank, Reno, Nevada, a promissory note, dated January 15, 1909, for the sum of $20,451.64, due January 16, 1909, payable to the order of said bank, and for said note and all other indebtedness to said bank now existing, or which may hereafter arise, or which now or may hereafter become liable as principal, debtor, or otherwise, do hereby pledge, transfer, and deliver to said bank the following securities, to wit: Certificate No. 20 for 479 shares of the capital stock of the Nye County Mercantile Company. Said bank shall not be liable for failure to collect said securities, nor for failure to present, protest, give notice, or sue thereon, but shall only be liable for what it actually collects or received on the same. In case the securities herewith pledged, or which may hereafter be pledged, shall become or be depreciated in value, on demand from said bank or holder of said note, I agree to make payment on said indebtedness, or deposit additional securities to the satisfaction of said bank or holder. Default in the payment of said indebtedness hereby secured, or failure to make payment or deposit additional security, as above provided, shall at the option of said bank at once mature all indebtedness secured hereby, and upon such default said bank is authorized and empowered, with or without notice to me or the public, to sell at private or public sale, the whole or any part of the aforesaid securities, and to deliver the same to the purchaser or purchasers thereof. At such sale [88] said bank may become the purchaser of

(Testimony of Harry M. Martin.)

the whole or any part of said securities, without any right of redemption on my part. The proceeds of such sale shall be applied first to the payment of all costs and expenses herein incurred, then to the payment in part or whole of any indebtedness hereby secured; said bank to have option of application. Any surplus left shall be paid to me. If the proceeds of such sale are not sufficient to pay all indebtedness hereby secured, I agree to pay balance on demand.

H. M. MARTIN."

I think that I borrowed this money in October, 1906. The value of the Nye County Mercantile Company stock at that time was from $75,000 to $100,000. With the money that I borrowed I bought more stock in the Nye County Mercantile Company. The value of the stock increased until October, 1907, the month of the panic. The net value of the business of the Nye County Mercantile Company was something over $250,000 on the first of June, 1907. Referring back to the 50 shares of stock which were transferred into my name, I paid nothing for that stock.

(The testimony of H. M. Martin as to what took place between himself and Mr. Taylor in reference to a loan from the Washoe County Bank or giving security therefor was admitted subject to the objection of the defendants that it was not competent evidence as against the bank because it was not shown that the same was ever brought to the attention of the bank or to any one authorized to represent the

(Testimony of Harry M. Martin.)

bank, and that it is wholly immaterial whether the bank did or did not accept any security for this loan as the acceptance of such security did not in any way constitute a waiver of the bank's lien upon the stock which stood in Harry M. Martin's name.)

Cross-examination.

[89]

I was appointed a director of the Washoe County Bank about February 10, 1903, and qualified at once and acted as a director the first regular meeting subsequent to that date. I attended some of the stockholders' meetings, but I have no recollection of being present at any particular meetings. I could not remember the dates. I think that I acted as proxy for the Martin Estate Company, and that at every meeting I attended I represented and voted the 50 shares of stock which stood in my name. To my best recollection my mother was not present at any of the stockholders' meetings that I attended. I have never been a member of the Martin Estate Company, although I was more or less familiar with its business affairs until 1905, when I went to Tonopah, as I acted as Secretary and kept its accounts. Mr. Taylor succeeded me in that position, and after Mr. Taylor, Mr. Stadtmuller. The Martin Estate Company exercised ordinary business discretion in keeping its affairs private. It is possible that I had given a proxy to represent the fifty shares of stock that stood in my name, and if the records of the stockholders meetings of the Washoe County Bank so show, there is no doubt in my mind as to their

(Testimony of Harry M. Martin.)

correctness. I never paid any interest on my loan from the bank. I could have paid it until the panic of 1907, but I was using the money in my business. The bank never received any dividend of the Nye County Mercantile Company's stock. A dividend, however, was paid in 1907 on some stock that my mother had. The dividend declared on the stock transferred to the Washoe County Bank as collateral was credited to surplus account, for the reason that I did not have the money ready at that time, and I planned to pay it later. I am not absolutely sure whether I gave an original note and the renewal in 1909. My recollection is that it was an open account until I gave the note in 1909. From my experience in my father's business and with the Washoe County Bank, I know that it is customary for a bank [90] to refuse to pay money on a check without its being endorsed. While I may have got the money on the two dividend checks containing only my endorsement, the benefit of the money did not accrue to me. It is possible that I actually got the money, but it is improbable, for I think that the check was probably endorsed and deposited by me to the credit of the estate.

When I paid dividends upon stock of the Nye County Mercantile Company to my mother, and did not pay dividends on the stock which was given as collateral security to the Washoe County Bank, I did not notify the bank for the reason that I considered its loan perfectly good. They could have had their money if they had wanted it. I could have

(Testimony of Harry M. Martin.)

paid it at any time until the panic of 1907. My business in Tonopah was foreclosed on a mortgage, and the creditors took it over. This was during the summer of 1911. After the panic of 1907 I did not have the ready cash to pay the bank's note. I would have had to borrow money to pay it. I owned 49% of the stock in the Nye County Mercantile Company, and H. C. Cutting owned 51%. I used the money I borrowed from the Washoe County Bank to buy out Mr. Cutting's interest. I had all the stock, with the exception of some sold to my mother. Immediately after the panic of 1907, the property of the Nye County Mercantile Company was mortgaged to secure its creditors, and that mortgage was afterwards foreclosed and the property sold.

I know Mr. C. T. Bender, and know his signature.

(The witness is here shown a proxy for the annual meeting of the stockholders of the Washoe County Bank for the meeting of July 11, 1905.)

That is Mr. Bender's signature on the proxy, and that is also my signature.

WHEREUPON Defendant's Exhibit No. —— was admitted in evidence and read as follows: [91]

Defendants' Exhibit No. ——, Proxy for Annual Meeting of Stockholders of the Washoe County Bank for Meeting of July 11, 1905.

"Know all men by these presents, that I "H. M. Martin, do hereby constitute and appoint C. T. Bender my true and lawful attorney for me, and in my name, place and stead, to vote as my proxy at the

annual meeting of the stockholders of the Washoe County Bank, Reno, Nevada, on July 11, 1905. Certificate No. 171, fifty shares, and according to the number of votes to which I would be entitled if personally present, with full power of substitution or revocation.

H. M. MARTIN."

Witness my hand and seal at Tonopah this 5th day of July, 1905.

H. M. MARTIN.

On the margin is written: "Please fill in name, sign and return. C. T. Bender, Secretary."

WHEREUPON witness was shown a proxy dated June 10, 1907. The signature of Mr. Bender on this proxy is his, and my signature was written by him.

WHEREUPON Defendant's Exhibit No. —— was admitted in evidence and read as follows:

Defendants' Exhibit No. ——, Proxy Certificate of the Washoe County Bank Dated June 10, 1907.

"Proxy Certificate of the Washoe County Bank, Reno, Nevada.

Know all men by these presents: That I hereby constitute and appoint C. T. Bender my true and lawful attorney for me and in my name, place and stead, to vote as my proxy at the annual meeting of stockholders of above-named corporation, to be held on ————, or any adjourned meeting, fifty shares of the capital stock, and according to the number of votes to which I would be entitled if personally present, with full power of substitution and revocation. Witness my hand and seal at Tonopah,

Nevada, this 10th day of June, 1907.

[Seal] H. M. MARTIN.

Witness: J. L. Moore." [92]

Mr. CHENEY.—Upon the back of this certificate: "I hereby substitute and appoint Mrs. Louise W. Martin under this proxy. C. T. Bender."

(Witness is here shown proxy dated July 1, 1909.)

The signature on this proxy is mine.

WHEREUPON Defendant's Exhibit No. —— was admitted in evidence and read as follows:

Defendants' Exhibit No. ——, Proxy Certificate of the Washoe County Bank Dated July 1, 1909.

"Proxy Certificate of the Washoe County Bank, Reno, Nevada.

Know all men by these presents, that I hereby constitute and appoint Estate of W. O'H. Martin, Inc., my true and lawful attorney for me and in my name, place, and stead, to vote as my proxy at the annual meeting of stockholders of the above-named corporation to be held on the —— or at any adjourned meeting, fifty shares of the capital stock, and according to the number of votes to which I would be entitled if personally present, with full power of substitution and revocation. Witness my hand and seal at ———, July 1, 1909.

H. M. MARTIN. Seal."

(Witness is here shown proxy dated July 2, 1910.)

The signature thereon is my signature.

WHEREUPON Defendant's Exhibit No. —— was admitted in evidence and read as follows:

Defendants' Exhibit No. ——, Proxy Certificate of the Washoe County Bank Dated July 2, 1910.

"Proxy certificate of the Washoe County Bank, Reno, Nevada.

Know all men by these presents, that I hereby constitute and appoint Estate of W. O'H. Martin my true and lawful attorney for me and in my name, place and stead, to vote as my proxy at the annual meeting of stockholders of the above-named corporation to be held on July 12, 1910, or at any adjourned meeting of my shares of the capital stock, and according to the number of votes to which I would be entitled [93] if personally present, with full power of substitution and revocation. Witness my hand and seal at Reno, Nevada, the 2d day of July, 1910.

H. M. MARTIN. Seal."

(Witness is here shown proxy dated July 11, 1911.)

I am acquainted with the signature of my mother, Mrs. Louise W. Martin. The signature on this certificate is here.

WHEREUPON Defendants' Exhibit No. —— was admitted in evidence and read as follows:

Defendants' Exhibit No. ——, Proxy Certificate of Washoe County Bank, Dated July 11, 1911.

"Proxy certificate of the Washoe County Bank, Reno, Nevada.

Know all men by these presents, That the undersigned corporation hereby constitutes and appoints

Fred Stadtmuller its true and lawful attorney for it and in its name, place and stead, to vote as its proxy at the annual meeting of stockholders of the above-named corporation to be held on July 11, 1911, two P. M., or at any adjourned meeting, three hundred (300) shares of the capital stock, and according to the number of votes to which it would be entitled if personally present, with full power of substitution and revocation. Witness its hand and seal at Reno, Nevada, the 11th day of July, 1911.

ESTATE OF W. O'H. MARTIN INCORPORATED.

By LOUISE W. MARTIN, Seal.
President.

Redirect Examination.

As to these proxies which have just been introduced in evidence they were sent to me by letter while in Tonopah, and I was asked to fill them in and return them.

(Witness is here shown a Washoe County Bank Deposit Book in the name of the Estate of W. O'H. Martin.)

Referring to a certain dividend check for Dividend #22, dated July 13, 1903, which was endorsed by myself alone, and comparing it with an entry in this Deposit Book of July 20th, 1903, my recollection is refreshed, and I am sure that I deposited that check direct. Yes, I remember vaguely of depositing a check under the circumstances. **[94]**

Testimony of C. T. Bender, for Plaintiffs.

C. T. BENDER, called as a witness on behalf of plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I am now, and ever since the organization of the Washoe County Bank have been its Cashier and a Director.

(The witness is here shown the account-book of the Estate of W. O'H. Martin with the Washoe County Bank, and his attention directed to Item, Dividend No. 22.)

This deposit of $300 is, I believe, in the handwriting of Mr. Froelich, who was formerly a Receiving Teller. Turning to the date of January 18, 1904, "Deposit S. F. $1800." This entry is also in Mr. Froelich's handwriting.

WHEREUPON Plaintiff's Exhibit No. 16 was admitted in evidence, as far as it shows deposits of dividend checks, and read as follows;

Plaintiffs' Exhibit No. 16—Deposit of Dividend Check With Washoe County Bank.

"Jul. 20, 1903.	Div. #22 H. M. M.....	$ 300.00
"Jan. 11, 1906.	Dividend	1500.
"Feb. 6, 1906.	Bank Div.	300.
"July 12, 1906.	Div. Bank	1500.
"Aug. 10. 1906.	Bk. Divd. by H. M. M....	300.

Testimony of Mrs. W. O'H. Martin, Recalled for Plaintiffs.

Direct Examination.

On the return of Mr. Taylor from Tonopah in the early months of 1909, nothing was said, nor was anything brought to my attention indicating that the indebtedness of Harry Martin to the bank in any wise affected my stock. It was not until July, 1909 that I learned that there was any question about my stock being transferred. This was when Mr. Stadtmuller called the matter to my attention.

Cross-examination.

When Mr. Taylor went to Tonopah he went at my request, and I paid his expenses. He was in my employ at that time.

Testimony of T. T. C. Gregory, for Plaintiffs.

T. T. C. GREGORY, being called as a witness on behalf of the [95] plaintiffs, having been duly sworn testified as follows:

Direct Examination.

I reside in San Francisco, and am an attorney at law. Mrs. Gregory, one of the plaintiffs, is my wife. In July, 1911, I went to Reno with reference to the stock in controversy here. I talked with both Mr. Mapes and Mr. Taylor and the directors of the bank. I met Mr. Mapes and Mr. Taylor together in the Washoe County Bank. I represented at that time the Estate of W. O'H. Martin. I asked Mr. Mapes to secure the transfer of this stock to the Estate of Martin. I stated that this was a matter which I felt

(Testimony of T. T. C. Gregory.)

the officials of the bank were thoroughly aware of, and I felt that equitably, no matter what the legal rights might be that the stock should be transferred. I urged Mr. Mapes to secure the necessary action on the part of the Board of Directors to purcure this transfer. I stated that in my opinion this stock was legally as well as equitably the stock of the Martin Estate corporation, and that I would be glad to submit to the attorneys for the bank some authorities which I had at that time bearing on the subject. Mr. Mapes stated that he would see that the matter was brought up before the directors.

I also appeared before the Board of Directors of the Washoe County Bank, and requested them to cause this stock to be transferred, and they said they would submit the matter to Judge Cheney, or to his firm, for a legal opinion.

(The above testimony of Mr. Gregory was admitted subject to the objection of the defendants that it was incompetent on the ground that it related to conversations had subsequent to the contracting of the liability of H. M. Martin and after the lien of the bank on this stock had attached.)

(The witness is here shown a carbon copy of a letter.)

This is a carbon copy of a letter that I subsequently wrote to the bank.

WHEREUPON a letter from T. T. C. Gregory to the Washoe County [96] Bank, dated August 18th, 1911, was admitted in evidence and marked Plaintiff's Exhibit No. 17, and read as follows:

Plaintiffs' Exhibit No. 17—Letter, August 18, 1911, Gregory to Washoe County Bank.

"Aug. 18th, 1911.

Washoe County Bank,
Reno, Nevada.

Gentlemen:

Some time ago I was advised that you would notify me of the opinion which was to be rendered to you by Judge Cheney in regard to the transfer of stock from the name of H. M. Martin to Estate of W. O'H. Martin, Inc. Please advise me whether the opinion has been received, and if so, what your intention is in the matter.

Yours very truly,
T. T. C. GREGORY."

(Witness is here shown a letter.)

I received this letter on the 24th of August, 1911.

WHEREUPON a letter from George H. Taylor, Assistant Cashier, to T. T. C. Gregory, was admitted in evidence and marked Plaintiffs' Exhibit No. 18, and read as follows:

Plaintiffs' Exhibit No. 18—Letter, August 23, 1911, Taylor to Gregory.

"Reno, Nevada, August 23, 1911.

T. T. C. Gregory,
Attorney-at-Law,
San Francisco,
California,

Dear Sir:

Replying to your letter of the 18th inst., Judge

Cheney is away on his vacation. As soon as he returns, we will advise you of his opinion in the matter referred to.

Yours very truly,

"G. H. TAYLOR, A. Cas."

(Witness is here shown a carbon copy of a letter.)

This is a carbon copy of a letter which I sent to them in the regular course of mail.

WHEREUPON a letter from T. T. C. Gregory to the Washoe County Bank was admitted in evidence and marked Plaintiff's Exhibit No. 19, and read as follows: [97]

Plaintiffs' Exhibit No. 19—Letter, September 20, 1911, Gregory to Washoe County Bank.

"September 20, 1911.

Washoe County Bank,

Reno, Nevada,

Dear Sirs:

Please advise me whether Judge Cheney has returned and has rendered an opinion to you regarding the transfer of Certificate of certain shares of stock from the name of H. W. Martin to Estate of W. O'H. Martin, Incorporated. You will recall that it was understood when I was in Reno at your directors' meeting that when information was received, it would be transferred to me.

Yours very truly."

(Witness is here shown a letter.)

I received this letter on the 26th of September, 1911.

WHEREUPON a letter from George H. Taylor, Assistant Cashier, to T. T. C. Gregory, dated September 25th, 1911, was admitted in evidence and marked Plaintiff's Exhibit No. 20, and read as follows:

Plaintiffs' Exhibit No. 20—Letter, September 25, 1911, Taylor to Gregory.

"Reno, Nevada, Sept. 25th, 1911.

Mr. T. T. C. Gregory,
San Francisco,
California.

Dear Sir:

Replying to your letter of the 20th inst., under the facts as we understand them, we are advised that we should not transfer the stock standing in the name of H. M. Martin, while he is indebted to the Bank.

Yours very truly,
G. H. TAYLOR, A. Cas."

Cross-examination.

I am one of the plaintiffs in this action and I verified the amended complaint. I have known Mr. Rowland since 1902, and when I stated in this complaint that he resided in Nevada, I believed that he was such resident, and had been for a number of years.

As to Mr. Bender's residence, I have understood that he had business in both California and Nevada, and I gather that he was a resident of Nevada because he was a director of the Washoe County [98] Bank, and that he is there frequently among people in Nevada.

Testimony of Mr. C. T. Bender, Recalled for Plaintiffs.

Direct Examination.

I am familiar with the dividends that have been declared upon the fifty (50) shares of stock of the Washoe County Bank standing in the name of H. M. Martin since July, 1911.

(It is here stipulated between counsel that the value of the stock in question at the time of filing the bill in the above-entitled cause was in excess of $3,000.)

WITNESS.—(Continuing.) The following dividends were declared on the fifty (50) shares of stock in question:

Dividend No. 51—Jan. 13, 1913—5% or $5 a share.
Dividend No. 52—Jul. 10, 1913—4% or $4 a share.
Dividend No. —Jan. 15, 1914—4% or $4 a share.
Dividend No. —Jul. 1914—4% or $4 a share.

The market value of the stock of the Washoe County Bank in January, 1912 was $150 a share.

Testimony of Harry M. Martin, Recalled for Plaintiffs.

Referring to Plaintiffs' Exhibit No. 12, consisting of three dividend checks endorsed by George H. Taylor, on all of which my name is signed by Mr. Taylor, together with the Estate of W. O'H. Martin, I never gave Mr. Taylor authority to so endorse those checks for me.

Referring to Plaintiff's Exhibits Nos. 3, 5, 6, which are checks endorsed by your mother alone,

(Testimony of Harry M. Martin.)

I never gave her any authority to endorse those checks.

Referring to Plaintiffs' Exhibit No. 4, which is endorsed "H. M. Martin, per Estate of W. O'H. Martin, Inc., Assignee" and "Fred Stadtmuller, Agent." I never gave Mr. Stadtmuller authority to endorse that check.

Testimony of C. L. Harwood, for Plaintiffs. [99]

C. L. HARWOOD, called as a witness on behalf of plaintiffs, being duly sworn testified as follows:

Direct Examination.

I am counsel for the Estate of W. O'H. Martin, Inc., and was such in the month of September, 1912. I recollect a meeting in that month at which Mrs. Wight and Mr. Partridge were present. I recollect a request made by Mrs. Wight and Mr. Partridge that the Estate of W. O'H. Martin, Inc., bring suit against the Washoe County Bank to compel the transfer of the stock in liquidation here. The result was a refusal to bring the suit. The reasons given by Mrs. Martin were her long association with the bank through her husband and herself. The fact of her having been a depositor in the bank for many years and her husband having been President of the Bank, and of the social relations that existed in Reno. I think also some mention was made of the fact that the State Court would probably be influenced by the Bank.

Cross-examination.

As far as I remember the meeting in question was

(Testimony of C. L. Harwood.)

not a formal meeting of the Board of Directors of the Martin Estate Company. The meeting followed a telephonic demand that the Martin Estate Company be dissolved and distribution of it assests made to its different members. The demand was signed jointly by Mrs. Wight and Mrs. Gregory.

(Plaintiffs rest.)

WHEREUPON the following proceedings took place.

"Mr. CHENEY.—If the Court please, the Martin Estate Company, the real party in interest here, has filed an answer and before we proceed we would like to know what proof they have in support of their answer.

Mr. HARWOOD.—If the Court please, the Martin Estate Company adopts the evidence so far offered in support of its answer.

Mr. CHENEY.—And rests upon that? [100]

Mr. HARWOOD.—And rests upon that, yes.

Mr. CHENEY.—Then, may it please the Court, on behalf of these defendants, except the Martin Estate Company, Incorporated, we move the Court that this suit be dismissed upon the ground that the Court has no jurisdiction, for the reason,

First, that it is now shown that this is a suit wholly between citizens of different states, and that all the parties upon each side of the controversy are citizens of different states, and that it is not shown that all of the defendants are citizens of different states from that of the plaintiffs:

Second, upon the ground that it is not sufficiently

shown that this is not a collusive suit, brought by these plaintiffs as nonresident stockholders, instead of being brought by the defendant, Martin Estate Company, the real *party interest,* for the purpose of conferring upon this court a jurisdiction which would not otherwise exist.

The COURT.—The motion will be overruled."

WHEREUPON the attorneys for the defendants to maintain and prove the said issue on their part offered the following evidence, to wit:

Testimony of C. T. Bender, for Defendants.

C. T. BENDER, being called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

I am, and have been since 1880, the Cashier and Secretary of the Washoe County Bank, and a stockholder and director all such time.

(The attention of the witness is here directed to Minute-book of stockholders meetings of the Washoe County Bank.)

Referring to a proxy introduced in evidence, signed by Louise W. Martin for the Estate of W. O'H. Martin, appointing Fred Stadtmuller as proxy to represent that Estate for three hundred shares of the stock of the Bank at the meeting of July 11, 1911, the Minutes of that meeting show that the stockholders of the bank allowed Mr. Stadtmuller on motion to vote two hundred and fifty shares only.

D. A. Bender is my brother. His residence is in

(Testimony of C. T. Bender.)

Berkeley, California. At the time of the filing of the bill in this case on [101] January 13, 1913, he was not a citizen or resident of the State of Nevada.

H. M. Martin was appointed a director of the Washoe County Bank by the Board of Directors to fill the vacancy caused by the death of Mr. Lyman. (Witness is here shown the stock ledger of the Washoe County Bank.) This is the stock ledger of the Washoe County Bank kept in the usual course of business and showing the stockholders of the bank. I find by consulting the book that H. M. Martin was a stockholder of the bank on February 10, 1903. This Book further shows that on February 6th, he became a stockholder to the extent of fifty (50) shares represented by Certificate #171, dated February 9, 1903, the stock being still uncancelled and outstanding. The stock ledger also shows that the Estate of W. O'H. Martin prior to the 9th of February, 1903, owned three hundred (300) shares of the stock of the Washoe County Bank, represented by Certificate #106. The Estate of W. O'H. Martin owned no other shares except the shares represented by Certificate #106. (It is here admitted by counsel for the plaintiffs that upon the back of Certificate #106 under the printing thereon appears the name "Louise W. Martin" and "President" which was signed by Louise W. Martin.)

WHEREUPON Certificate #106 was read into the record as follows:

"Number 106. 300 shares. This certificate that

(Testimony of C. T. Bender.)

Estate W. O'H. Martin, Inc., of Reno, Nevada, is entitled to three hundred shares of the capital stock of the Washoe County Bank, of One Hundred Dollars each, transferable only on the books of the bank by endorsement and surrender of this certificate, after compliance with the conditions printed on its back. Reno, Nevada, July 10, 1902. C. T. Bender, Cashier. Geo. W. Mapes, President."

And in red ink across the face appears, "Cancelled February 9, 1903."

On the back of the certificate appears the following:

"No transfer of the stock described in this certificate will be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and all indebtedness due to the banking corporation by the person in whose name the stock stands on the books of the corporation, except with the consent, in writing, of the president." And immediately under that writing appears "Louise W. Martin, President." [102]

This certificate No. 106 was cancelled, and two new certificates issued in lieu thereof. Certificate No. 170, dated February 9, 1903, for two hundred and fifty (250) shares was issued to the Estate of W. O'H. Martin, Inc. Certificate No. 171, same date, for fifty (50) shares was issued in favor of H. M. Martin.

During the month of February, 1903, the Estate of W. O'H. Martin was not represented in stock of the Washoe County Bank belonging to it in any

(Testimony of C. T. Bender.)

single certificate to the amount of fifty (50) shares. The entire holding of the Estate in stock of the Washoe County Bank was represented by a single certificate of three hundred (300) shares.

The words "Cancelled, February 9, 1903," in red ink on the front of Certificate No. 106 are in the handwriting of George H. Taylor, the Assistant Cashier of the Bank. (Witness here refers to the Minute-book of the Board of Directors of the Washoe County Bank.)

H. M. Martin was appointed a director at a meeting of the Board held on February 10, 1903, at which meeting there were present D. A. Bender, M. E. Ward, George W. Mapes, A. H. Manning, and F. M. Rowland. Absent, C. T. Bender. The records show that on the motion of A. H. Manning, seconded by F. M. Rowland, H. M. Martin was appointed a director of the Bank to fill the unexpired term of the late Mr. D. B. Lyman, and the secretary was instructed to notify him of said action. The minutes are signed by George H. Taylor, Assistant Secretary. (It was here stipulated that counsel for defendants might read into the record the official oath of H. M. Martin as a director of the Washoe County Bank, and it was further stipulated that the signature on the oath was the signature of H. M. Martin. The said oath read as follows:)

"Official Oath. State of Nevada, County of Washoe, ss. I, H. M. Martin, do solemnly swear that I will support and defend the constitution and government of the United [103] States and

(Testimony of C. T. Bender.)

the constitution and government of the State of Nevada against all enemies, whether domestic or foreign; and that I will bear true faith and allegiance and loyalty to the same, any ordinance, resolution, or law of any State convention of any State or legislature to the contrary notwithstanding; and further that I do this with a full determination, pledge and purpose, without any mental reservation or evasion whatsoever. And I do further solemnly swear that I have not fought a duel, nor sent nor accepted a challenge to fight a duel, nor been a second to either party, or in any manner aided or assisted in such duel, nor been knowingly the bearer of such challege or acceptance since the adoption of the constitution of the State of Nevada, and that I will not be so engaged or concerned, directly or indirectly, in or about any such duel during my continuance in office; and further that I will well and faithfully perform the duties of the office of director of the Washoe County Bank on which I am about to enter So Help me God. H. M. Martin. Subscribed and sworn to before me this 13th day of February, 1903, J. A. Bonham, County Clerk." Seal attached.

I first learned that it was suggested or intimated that H. M. Martin was not a true owner or genuine owner of the fifty (50) shares of stock of the Washoe County Bank in question during the year 1909. I heard this from Mrs. Martin.

(Witness here turns to the Minute-book of the stockholders meeting of the Washoe County Bank.) At the meeting dated July 14, 1903, H. M. Martin

(Testimony of C. T. Bender.)

was present and represented the fifty (50) shares of stock standing in his name on the books of the Washoe County Bank. H. M. Martin also represented the two hundred and fifty (250) shares of the Estate of W. O'H. Martin at that meeting. At that meeting the following directors were elected; George W. Mapes, D. A. Bender, F. M. Rowland, M. E. Ward, H. M. Martin, A. H. Manning and C. T. Bender, and it is admitted that they all took the oath of office as directors of the bank on that date.

It is also admitted by stipulation of counsel that on August 9th, 1904, Harry Martin represented fifty (50) shares for himself, and also as proxy for two hundred and fifty (250) shares of the Estate, and that he was again elected, and qualified as a director, and that he was present June 3, 1905, as a director at the meeting [104] of the Board of Directors for the last time. It is also admitted that at the meeting of the stockholders of July 11, 1905, H. M. Martin was not present, and his stock was represented by C. T. Bender, proxy. It is also admitted that on July 10, 1906, at a stockholders' meeting, C. T. Bender had a proxy for the H. M. Martin stock, and that the Estate stock was not represented. It is also admitted that on July 9, 1907, at a stockholders' meeting, the fifty (50) shares of stock of H. M. Martin were represented by Louise W. Martin, proxy, who also represented at that meeting the stock of the Martin Estate Company. It is also admitted that at the stockholders' meeting of July 14, 1908, the Martin Estate Company represented

(Testimony of C. T. Bender.)
two hundred and fifty (250) shares, the fifty (50) shares of H. M. Martin not being represented. It is also admitted that a stockholders' meeting dated July 12, 1910, the Martin Estate Company was represented by Mrs. Martin's two hundred and fifty (250) shares and the fifty (50) shares of H. M. Martin were represented by the Martin Estate, proxy.

H. M. Martin was a director of the bank from February 10, 1903, until about July 1st, 1905. I did not at any time while Mr. H. M. Martin was a director of the bank as a director, stockholder or officer of the bank have any intimation or knowledge whatever that H. M. Martin was not a genuine stockholder, owning stock in that bank. (Witness here refers to the Minute-book of the Directors of the Washoe County Bank.)

Referring to the record of the meeting of October 9, 1906, it shows an authorization of a loan of Fifteen Thousand dollars ($15,000) to Harry Martin on October 9, 1906, by a Resolution of the Board of Directors. The part of the record material to this inquiry reads as follows:

"The application for loans and the loans made since last meeting of the board were approved as follows: **[105]**

H. M. Martin, $15,000 at 7 per cent, secured by 479 shares of the Nye County Mercantile Company stock. On motion of D. A. Bender, seconded by A. M. Ward, the loan to Mr. Martin was granted."

There were present at that directors' meeting, D. A. Bender, A. H. Manning, M. E. Ward, A. M. Ward

(Testimony of C. T. Bender.)

and F. *E.* Rowland. Absent George W. Mapes and C. T. Bender. At the present time D. A. Bender is paralyzed and confined to his bed.

I did not learn until a subsequent meeting of the loan to H. M. Martin. That was the meeting of November 13th, 1906. All the members of the Board were present. At that meeting or prior to the meeting I had no knowledge or information tending to show that H. M. Martin was not the owner of the fifty (50) shares of stock of the Washoe County Bank that stood in his name. (Witness' attention is here directed to the Minutes of the Stockholders' Meetings of the Washoe County Bank.)

At an adjourned meeting of the stockholders, August 10th, 1909, the number of the directors was increased from seven to nine. The following directors were elected: George W. Mapes, D. A. Bender, A. H. Manning, C. T. Bender, G. H. Taylor, F. M. Rowland, O. M. Ward, Fred Stadtmuller, Adolph Herz. Neither Fred Stadtmuller nor George H. Taylor had been directors of the Washoe County Bank prior to August 10, 1909, and they have both been directors ever since.

I remember a conversation with Mrs. Louise Martin in 1909, relative to the ownership of the fifty (50) shares of stock of the Washoe County Bank that stood in the name of H. M. Martin. My recollection is that she and Mr. Stadtmuller brought the fifty (50) shares of stock to me to be transferred, at which time I declined to transfer it. Mrs. Martin notified me that the stock belonged to the Mar-

(Testimony of C. T. Bender.)

tin Estate Company, was their stock and always had been. I declined to transfer it until the indebtedness of Mr. Harry Martin [106] was paid. Harry Martin was then and is now indebted to the bank in approximately $20,000. Mrs. Martin did not use these words "Please do not send that check to Harry. You know the stock is ours," as far as I remember. I do not remember anything with reference to a dividend check of Harry M. Martin being said by Mrs. Martin when she was there at that time."

IT IS HERE ADMITTED BY COUNSEL that the by-law set out in the Answer of the Washoe County Bank herein was the duly adopted by-law of the Washoe County Bank at all times in controversy, and that the said by-law was upon the front and back of each certificate of stock of the Washoe County Bank.

I certainly never made any agreement or gave any assurance to anybody that Mr. Harry M. Martin should be a director of the bank without being a genuine owner of stock in the bank.

Cross-examination.

After having the conversation with Mrs. Martin in July, 1909, I did not take and proceedings to collect the debt from Harry Martin. Neither I, nor the bank have at any time taken any steps to collect the debt from Harry Martin, other than to send him notices asking him to pay. These notices were to pay both principal and interest and I suppose the first notices were six months after the date of

(Testimony of C. T. Bender.)

the note. We always send out notices in June and December for settlement.

When Harry Martin failed to pay either principal or interest, I took no steps by action at law, or otherwise, to collect the debt.

Q. You could have collected it if you had done so, couldn't you? A. I don't think so.

Q. Did you attempt to sell the stock which you held under pledge and collateral agreement, giving you the right to sell?

Mr. CHENEY.—I understand this all goes in subject to the objection? [107]

The COURT.—All subject to the objection, yes.

A. No, we didn't particularly, we never could find anybody that would buy it."

I did not attempt to sell the stock which the bank held under pledge and collateral agreement. We never offered the shares of stock of the Nye County Mercantile Company for sale. We never proceeded in accordance with the statute of the State of Nevada to sell that collateral. The original loan was for $15,000. On January 5, 1909, Harry Martin gave a renewal note to cover the principal and interest then accrued. He never borrowed any money in addition to the $15,000. (The attention of the witness is here called to the Minutes of the Board of Directors of October 9th, 1906.) A reference to the Minutes shows that at the time the loan of $15,000 was granted Mr. Martin was already indebted to the bank for Twenty-two hundred and seventy-nine and 10/100 dollars ($2279.10.) On

(Testimony of C. T. Bender.)

November 24th, 1906, he gave his note for Seventeen thousand, five hundred dollars ($17,500), then in 1909 there was a renewal note for twenty thousand four hundred and fifty-one and 64/100 dollars ($20,451.64).

After my conversation with Mrs. Martin in 1909 and up to the July dividend of 1911 I delivered the dividend checks on the fifty shares of stock in question to Mr. Stadtmuller, to mail to Harry M. Martin. Stadtmuller was Assistant Cashier at the time, and he disobeyed my directions in mailing the dividend checks to the Estate of W. O'H. Martin. I never saw these dividend checks which were endorsed by someone other than Harry Martin until after this suit was started. The reason why I continued to have Mr. Stadtmuller send dividend checks to Harry Martin, although he was indebted, was because it was our custom to send checks to stockholders. I stopped this custom however, in 1911. I cannot give any particular reason why I did not stop in 1909 and 1910. We have never made an effort [108] to foreclose the lien that the bank claims on these fifty (50) shares of stock. We did not feel that we could get service on Mr. Martin, although possibly we could have got service on him between 1906 and 1911. At the time the loan was made to Harry Martin, Mr. Taylor was Assistant Cashier of the Washoe County Bank. I think I learned of the application for a loan made by Harry M. Martin to Taylor about a month afterwards. At the time of the loan in question the duties of the Assist-

(Testimony of C. T. Bender.)

ant Cashier were the same as the duties of the Cashier. The cashier is an executive officer in a way of the bank. Mr. Taylor was not only Assistant Cashier but he was also Assistant Secretary and I was Secretary.

(The witness is here shown Certificate No. 171, Plaintiffs' Exhibit No. 2.)

The words "H. M. Martin" in the body of the certificate are in the handwriting of Mr. Taylor. The words "M. E. Ward" are in the handwriting of M. E. Ward, the Vice-president of the bank.

Testimony of George W. Mapes, for Defendants.

GEORGE W. MAPES, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

I am President and Director of the Washoe County Bank, and have been such since January, 1902. I have been a stockholder ever since the bank's organization. I remember the death of Mr. Lyman and the matter of the appointment by the directors of his successor.

I had a conversation with Mrs. Martin as to the Martin Estate, obtaining a representation on the Board of Directors. I cannot state the exact date. The substance of the conversation was as follows: Mrs. Martin wanted to be represented in the Washoe County Bank. She wanted her son to become a director, and I stated to Mrs. Martin that no one could be a director of the Washoe County Bank without he owned stock in his own name. Mrs. Martin stated to me that she would let him have stock, or

(Testimony of George W. Mapes.)

give him stock, I would not say which. Mrs. [109] Martin stated that she had talked with several of the directors and they seemed to be willing to have her son become a director. She did not tell me who particularly. If I recollect, I think she mentioned some of the directors that she had had a talk with. I certainly believed that while Mr. Harry Martin was a director of the bank that he owned the shares of stock that were in his name. I would not have consented to his being a director if I had not so believed. I did not learn that anybody claimed the ownership in this stock other than Harry Martin until several years after he was elected a director. At the time of the loan to Harry Martin, in the fall of 1906, I had no intimation, knowledge or suggestion that Harry Martin was not the true owner of the fifty (50) shares of stock that stood in his name.

Testimony of F. M. Rowland, for Defendants.

F. M. ROWLAND, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

I live in Lassen County, California, and have lived there ever since 1854. I have never been a citizen or resident of the State of Nevada. I am a stockholder in the Washoe County Bank, and have been such for more than twelve years. I was appointed a director after Mr. Martin died, and have been such ever since. I remember the death of Mr. Lyman and the appointment of Mr. Harry Martin as his successor. I do not remember any conversation

(Testimony of F. M. Rowland.)

with Mrs. Martin about Harry Martin being appointed in Mr. Lyman's place. I do not remember a conversation in which Mrs. Martin suggested that Mr. Harry Martin be a director, and I replied that I was very fond of Harry, but I can say it now. At the time of Harry Martin's appointment on the Board of Directors I had no knowledge or intimation that he was not the owner of fifty (50) shares of stock that stood in his name on the books of the bank. **[110]** I had no such knowledge or information during any time that Harry Martin served as a director.

At the time of the loan I had no such knowledge. I had no idea but what he owned the stock. I would not at any time have consented to anybody being a director of the Washoe County Bank unless he was a genuine owner of the stock. The first time that I remember hearing that Harry Martin was not the true owner was when Harry Martin appeared before the Board of Directors in July, 1911. Until Mr. Gregory made his appearance I did not know that Mr. Harry Martin had endorsed the certificate for fifty (50) shares back to the Martin Estate.

Testimony of C. T. Bender, Recalled for Defendants.

I think that the first time that I heard the claim that Harry Martin had endorsed the fifty (50) shares of stock that stood in his name back to the Martin Estate was in July, 1911.

Testimony of George Mapes, Recalled for Defendants.

I did not learn that the certificate for fifty (50) shares of stock standing in the name of Harry Martin had been endorsed to the Martin Estate until I came to court. I first learned of a claim to this effect when Mr. Gregory met me in the Washoe County Bank and requested me to put it up to the directors.

I have been President ever since the fifty (50) shares of stock in question stood on the books of the Washoe County Bank in the name of Harry Martin. Neither as President of the bank nor in any other capacity did I ever consent that Mr. Martin could transfer this stock without the payment of his indebtedness to the bank.

Cross-examination.

After it was called to my attention that the fifty (50) shares of stock in question had been transferred back to Harry Martin in the presence of our Assistant Cashier, Mr. Taylor, I had a talk with him about it.

It is the custom of our Cashiers to report a matter of that **[111]** kind to the Board of Directors.

Mr. PARTRIDGE.—(Q.) Now, Mr. Mapes, when you are about to make a loan, or when a loan is asked for, is it the custom for the cashiers to report to the board all that they know about the person applying for the loan? A. To the president.

Q. No, for the cashiers.

A. To report to who?

(Testimony of George W. Mapes.)

Q. To report to the board all they know about the position, standing, and so forth, of the person applying for a loan?

A. It is customary, yes, sir—to report all the transactions of the bank to the board?

Q. Yes, sir. A. Yes.

The COURT.—Now, that answer was that it was customary to report all the transactions of the bank to the board of directors?

A. Yes, sir. I could explain that perhaps more definite if they would allow me to.

Mr. DOWNER.—All right. Proceed.

A. We have a loan committee; the directors of the Washoe County Bank is a committee; the majority rules; the cashiers are instructed to make a certain loan, but not to exceed a certain amount; and it had generally been the custom for people making an application for a loan to have them make a statement of the conditions of the individual or corporation: then it is usually acted on by the board, and whoever that report was handed to—that might be handed to me or the cashier, or some of the members of the bank—employees—but it is always generally acted on by the board.

Mr. PARTRIDGE.—(Q.) When collateral is tendered as security, who investigates the collateral—whose duty is it in the bank to investigate the collateral?

A. The whole board, or the majority of the board.

[112]

The COURT.—Give that answer again, please.

(Testimony of George W. Mapes.)

A. The committee.

The duties of the cashier in general terms, and in a few words are: That they are to make small loans and look after the interest of the bank. Now, I don't want to be misconstrued with any question I answered. The cashiers nor the president alone has a right to make very large loans in the Washoe County Bank but they do make them with the committee, or the majority of the committee, which is the directors of the bank, and a majority rules.

Defendants close.

And this concluded the testimony in the case.

The foregoing is presented as a statement of the evidence taken at the trial of said cause.

(Copy) JOHN S. PARTRIDGE,
Attorney for Plaintiffs.

Service of the above statement of the evidence is acknowledged and copy received this 14th day of Nov. 1917, and we hereby consent that the same may be settled as the Statement of Evidence as of this date.

(Copy) HARWOOD & SPRINGMYER,
COLE L. HARWOOD,
Attorneys for Defendant, Estate of W. O'H. Martin, Incorporated. **[113]**

Stipulation Re Statement of Evidence.

IT IS HEREBY STIPULATED AND AGREED that the foregoing constitutes all the testimony taken in the above-entitled matter and is correct

and that the same may be settled, certified and approved by the Judge of the above-entitled court.

CHENEY, DOWNER, PRICE & HAWKINS.

Order Settling and Approving Statement of Evidence.

I, E. S. Farrington, the Judge who tried the above-entitled cause, do hereby certify that the foregoing Statement of the Evidence is correct and that the same is hereby settled and approved.

Dated Dec. 3rd, 1917.

E. S. FARRINGTON,
Judge of the District Court.

[Indorsed]: No. 1636. In the District Court of the United States in and for the District of Nevada. Clara M. Wight and Otis B. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Inc., et al., Defendants. Statement of the Evidence. Filed December 7, 1917. F. J. Edwards, Clerk. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. **[114]**

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court.

You will please incorporate in the transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, the following additional portions of the record, to wit:

Defendants' motion to dismiss amended bill of complaint, and Opinion of Court on motion to dismiss amended bill of complaint.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendants, Except Estate of W. O'H. Martin, Incorporated.

Service of the above and foregoing praecipe acknowledged and copy received this 28th day of September, 1917.

_____,
Attorneys for Plaintiffs and Appellants.
COLE L. HARWOOD,
Attorney for Estate of W. O'H. Martin, Inc.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, et al., Defendants. Praecipe for Transcript of Record. Filed this 29th day of Sept., 1917. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Certain Defendants. **[115]**

In the United States District Court, in and for the District of Nevada, Ninth Judicial Circuit.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY, and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPORATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Motion to Dismiss an Amended Bill of Complaint.

Now come all the above-named defendants, except the Estate of W. O'H. Martin, Incorporated, a corporation, by their solicitors, and move the above-named court to dismiss the amended bill of complaint in the above-entitled action, upon the following grounds:

1. That the facts stated in said bill are insufficient to constitute a valid cause of action in equity against these defendants.

2. That said amended bill is insufficient in that it does not give the Christian names of the plaintiff T. T. C. Gregory, or of the defendants O. W. Ward,

F. M. Rowland, C. T. Bender, A. H. Manning and D. A. Bender.

3. That it appears upon the face of said amended bill that said plaintiffs' alleged cause of action arises from, and is the consequence of an illegal transaction between the Estate of W. O'H. Martin, Incorporated, and the Washoe County Bank, and that plaintiff does not come into a Court of Equity with clean hands.

CHENEY, DOWNER, PRICE & HAWKINS,
A. E. CHENEY,
Solicitors for said Defendants.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, et al., Defendants. Motion to Dismiss Amended Bill of Complaint. Filed this 27th day of May, 1913. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for said Defendants. **[116]**

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY, and T. T. C. *WIGHT,* Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPO-

RATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Opinion on Motion to Dismiss Amended Bill of Complaint.

MASTICK & PARTRIDGE, for Plaintiffs.

CHENEY, DOWNER, PRICE & HAWKINS, for Defendants.

FARRINGTON, District Judge.

In the year 1902, the defendant, the Estate of W. O'H. Martin, Incorporated, caused to be transferred on the books of the Washoe County Bank fifty shares of its stock into the name of Harry M Martin, for the sole purpose of qualifying him to act as a director of the bank. When the certificate was so issued Mr. Martin, although he re-transferred it to the Estate of W. O'H. Martin, Incorporated, became, and continued to act as, a director of said bank until some time in the year 1905. This was all fully understood by the bank. The stock still stands on the books of the bank in the name of Harry M. Martin. Until the year 1911, the bank continued to pay all dividends on the fifty shares of stock to the said estate. During that year—the date is not precisely fixed—the bank for the first time claimed that the Martin Estate was not the owner of the stock in question, and refused to pay the latter any dividends thereon. The dividends declared since

such refusal amount to $850.00. Subsequent to the refusal, the estate presented to the bank the certificate, duly endorsed by Harry M. Martin, and demanded that it immediately transfer said fifty shares on its books into the name of said Estate of W. O'H. Martin, Incorporated, and issued a new certificate therefor. This also the bank refused to do. Suit [117] was brought January 13, 1913, by complainants Clara M. Wight and Gertrude M. Gregory, as owners of two hundred shares each of the capital stock of defendant estate, praying that the bank and its officers, be compelled and directed by decree of this court, to transfer the said fifty shares of stock on the books of the bank, and issue a certificate or certificates therefor to said Estate of W. O'H. Martin, Incorporated, and also to pay to the latter all dividends accrued or to accrue thereon. Otis B. Wight is joined as the husband of Clara M. Wight, and T. T. C. Gregory, as the husband of Gertrude M. Gregory.

The suit is now before the Court on the motion of all the defendants, except the Estate of W. O'H. Martin, Incorporated, to dismiss the bill of complaint, on the ground "that it appears upon the face of said amended bill that said plaintiffs' alleged cause of action arises from, and is the consequence of an illegal transaction between the Estate of W. O'H. Martin, Incorporated, and the Washoe County Bank, and that plaintiff does not come into a court of equity with clean hands."

The alleged illegality is in this, that Harry M. Martin acted as a director of the bank, and it was

the intention and understanding both of the bank and of the estate, that he should so act while he was neither the owner nor the holder of the stock in question, and the stock was allowed to remain in his name on the books of the bank for that purpose.

The Nevada statute, under which the bank was operating in 1902 (Rev. Laws of Nevada, sec. 1223), provided that the "powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders in the company."

In State vs. Leete, 16 Nev. 242, it was held that a person who holds stock issued to him, and standing on the books of the corporation in his name, is eligible to be a director, although he may not in fact be the owner of the stock.

In Orr Water Ditch Company vs. Reno Water Company, 17 Nev. 166, 170, the stockholders of the Reno Water Company, including the directors, sold all their stock to one George B. Hill. The directors did not resign at the time of the sale, and a few months later met and allowed an account against the **[118]** company to the amount of $1,138.65, in favor of the Orr Water Ditch Company. It was held that when the trustees sold and delivered their stock to Hill, they ceased to be trustees of the Water Company, because they were no longer stockholders in the corporation.

It would seem, therefore, that when Harry M. Martin retransferred the fifty shares of stock to the Estate of W. O'H. Martin, Incorporated, he was no longer a stockholder in the bank, and *ipso facto,* ceased to be a director thereof; nevertheless, he

continued to act as such until some time in 1905. This *clearly illegal,* and any understanding or agreement that he should so act was also illegal. Such an act or understanding, however, cannot be characterized as immoral or criminal; it is merely illegal.

It is well settled that a court of equity will not lend its aid to enforce an illegal agreement, or to assist a wrongdoer in obtaining the fruits of an illegal act. However, it will not decline to enforce and protect rights, in so far as they are not based upon or supported by that which is illegal.

In the present case the right to have the stock transferred on the books of the bank, and other certificates issued in lieu thereof, in the name of the estate, does not rest on an illegal transaction. Complainants do not require the aid of the illegal contract to establish their right. Their action is in no sense an affirmance of the contract.

1 Page on Contracts, sec. 527.

No part of the profit or advantage arising therefrom is asked for. The transaction alleged to be illegal has been completed and closed for more than eight years, and will not be affected in any manner by what the Court is now asked to do. The estate owned the stock long prior to the transfer to Martin, and still owns it. It is the owner and in possession of the stock certificate. The certificate, properly endorsed and assigned to the estate, was duly presented to the bank, with a demand that new certificates be issued therefor.

The right to a transfer on the books of the company depends on its by-laws and on the statutes

which fix and determine the conditions upon which such **[119]** transfers may be had. These terms are usually set out in the stock certificate itself, and constitute a contract beween the corporation and the holders of its stock. Complainants' right here are based upon that contract, and in order to maintain and support them, it is not necessary to resort to the illegal transaction and agreement set out in the bill.

Evans v. Dravo, 62 Am. Dec. 359, 362;
Wright v. Pipe Line Co., 47 Am. Rep. 701;
Allebach v. Godshalk, 9 Atl. 444;
Irvin v. Irvin, 29 L. R. A. 292;
Robson v. Hamilton, 69 Pac. 651;
Primeau v. Granfield, 180 Fed. 847;
9 Cyc. 556;
1 Page on Contracts, sec. 527.

The motion is overruled. Defendants will be allowed twenty days within which to answer or otherwise plead, as they may elect.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Opinion on Motion to Dismiss Amended Bill of Complaint. Filed February 24th, 1914. T. J. Edwards, Clerk. **[120]**

In the District Court of the United States for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing one hundred and twenty (120) typewritten pages, numbered from 1 to 120, inclusive, to be a full, true and correct copy of the record and of all proceedings in said cause and court, and that the same, together with the original Citation on Appeal and stipulations and orders extending time to file record, hereto annexed, constitute the return to the Citation on Appeal.

I do hereby certify that the cost of the foregoing record is $67.95, and that the same has been paid by the plaintiffs herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Carson City, Nevada, this 12th day of December, 1917.

[Seal] T. J. EDWARDS,
Clerk. [121]

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. C. GREGORY, Her Husband,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Citation on Appeal.

United States of America,—ss.

The President of the United States to Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Incorporated, a Corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, GREETINGS:

You are hereby admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order al-

lowing an appeal, filed and entered in the Clerk's Office of the District Court of the United States for the District of Nevada, upon a final decree signed, filed and entered on the 19th day of June, 1917, in that said suit being in equity No. 1636, wherein you are the defendants and appellees, and Clara M. Wight and Otis B. Wight, her husband, and Gertrude M. Gregory and T. T. C. Gregory, her husband, are plaintiffs and appellants, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, Honorable E. S. FARRINGTON, United States District Judge for the District of Nevada, this 10th day of August, 1917.

E. S. FARRINGTON,
United States District Judge.

Due service of the within Citation on Appeal and receipt of a true copy thereof this 15th day of August, 1917, is hereby admitted.

COLE L. HARWOOD,
Atty. for Estate of W. O'H. Martin, Incorporated.

Receipt of a true copy of the within this 15th day of August, 1917, is hereby admitted.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Washoe County Bank and Certain Other Defendants.

[Endorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight and Otis B. Wight et al., Plaintiffs,

vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Inc. et al., Defendants. Citation on Appeal. Filed August 16th, 1917. T. J. Edwards, Clerk. By H. O. Edwards, Deputy.

Stipulation Re Extension of Time for Filing Amendment to Plaintiffs' Statement of Evidence.

[TELEGRAM.]

312SFEF 20 Collect

MX San Francisco, Calif. 222 P Sep 27 1917

Cheney Downing Price and Hawkins. 166

Reno Nev.

Re Wight versus Washoe will grant extension for filing amendments to Monday October fifteenth Please advise clerk of extension.

ALAN C. VAN FLEET.

Agreed to:

COLE L. HARWOOD,

Solicitor for Estate of W. O'H. Martin, Inc.

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WRIGHT, Her Husband et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation et al.,

Defendants.

Order Extending Time to and Including October 15, 1917, to File Amendment to Plaintiffs' Statement of Evidence.

By consent of county, and good cause appearing therefor, IT IS ORDERED that the time for the defendants, other than the Estate of W. O'H. Martin, Incorporated, a corporation, to propose and file amendments to the plaintiffs' statement of evidence in the above-entitled action, be and the same hereby is extended to and including Monday, October 15, 1917.

Dated: Carson City, September 29th, 1917.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Order Extending Time. Filed this 29th day of Sept., 1917. T. J. Edwards, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a

Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, *O.* T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants and Apellees.

Stipulation Enlarging Time to and Including December 20, 1917, to File Record and Docket Cause in Appellate Court.

It is stipulated and agreed by and between plaintiffs and appellants and defendants and appellees, that the plaintiffs and appellants herein may have to and including Thursday, the 20th day of December, 1917, within which to file the record on appeal in the above-entitled cause, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

JOHN S. PARTRIDGE,

Attorneys for Plaintiffs and Appellants.

COLE L. HARWOOD,

Attorneys for Defendant and Appellee, Estate of W. O'H. Martin, Incorporated.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendants and Appellees Other Than Estate of W. O'H. Martin, Inc.

Order of Enlargement.

Upon reading the above stipulation, and good cause appearing therefor, it is hereby ordered that plaintiffs and appellants in the above-entitled cause may have to and including Thursday, December 20,

within which to file their record on appeal herein, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

_____,

District Judge.

[Endorsed]: No. 1636. In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et al. vs. Washoe County Bank et al. Stipulation and Order of Enlargement. Filed Nov. 21st, 1917. T. J. Edwards, Clerk U. S. Dist. Court Dist. Nevada.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,

Plaintiffs and Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPLES, O. W. WARD, F. M. ROWLAND, O. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants and Appellees.

Stipulation and Order Enlarging Time to and Including November 20, 1917, to File Record and Docket Cause in Appellate Court.

It is stipulated and agreed by and between plaintiffs and appellants and defendants and appellees, that the plaintiffs and appellants herein may have to and including Tuesday, the 20th day of November, 1917, within which to file the record on appeal in the above-entitled cause, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

JOHN S. PARTRIDGE,
Attorney for Plaintiffs and Appellants.
COLE L. HARWOOD,
Attorney for Defendant and Appellee, Estate of W. O'H. Martin, Incorporated.
CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendants and Appellees Other Than Estate of W. O'H. Martin, Inc.

Order of Enlargement.

Upon reading the above Stipulation, and good cause appearing therefor, it is hereby ordered that Plaintiffs and Appellants in the above-entitled cause may have to and including Tuesday, November 20, 1917, within which to file their record on appeal herein, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 1636. In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et al., Plaintiffs and Appellants, vs. Washoe County Bank et al., Defendants and Appellees. Stipulation and Order of Enlargement. Filed Nov. 1st, 1917. T. J. Edwards, Clerk.

[Endorsed]: No. 3091. United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight and Otis B. Wight, Her Husband, and Gertrude M. Gregory and T. T. C. Gregory, Her Husband, Appellants, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Incorporated, a Corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed December 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,
vs.
WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPORATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants and Appellees.

Order Enlarging Time to and Including October 1, 1917, to File Record and Docket Cause in Appellate Court.

Good cause appearing therefor, it is hereby ordered that plaintiffs and appellants in the above-entitled cause may have to and including Monday, October 1st, within which to file their record on appeal herein, and docket the case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

E. S. FARRINGTON,
District Judge.

Dated: Aug. 31, 1917.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et

al., Plaintiffs and Appellants, vs. Washoe County Bank, a Corporation, et al., Defendants and Appellees. Order of Enlargement. Filed Sep. 4, 1917. F. D. Monckton, Clerk. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,
vs.
WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H. MARTIN, INCORPORATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants and Appellees.

Order Enlarging Time to and Including November 1, 1917, to File Record and Docket Cause in Appellate Court.

Good cause appearing therefor, it is hereby ordered that plaintiffs and appellants in the above-entitled cause may have to and including Thursday, November 1st, 1917, within which to file their record on appeal herein, and docket the case with the clerk

of the United States Circuit Court of Appeals for the Ninth Circuit.

E. S. FARRINGTON,
District Judge.

Dated: Sept. 15th, 1917.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et al., Plaintiffs and Appellants, vs. Washoe County Bank, a Corporation, et al., Defendants and Appellees. Order Under Rule 16 Enlarging Time to Nov. 1, 1917, to File Record thereof and to Docket Case. Filed Sep. 19, 1917. F. D. Monckton, Clerk. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

[TELEGRAM.]

RECEIVED AT 722 MARKET ST., SAN FRANCISCO.

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MASTICK AND PARTRIDGE

SAN FRANCISCO CALIF

PROCURE FURTHER TIME TO FILE WIGHT CASE STATEMENT NOT SETTLED JUDGE ABSENT

T. G. EDWARDS.

144 PM

[TELEGRAM.]

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STATEMENT NOT SIGNED JUDGE FARRINGTON IS IN CALIFORNIA

COLE L HARMOOD

1010 AM

In the United States Circuit Court of Appeals in and for the Ninth District.

CLARA M. WIGHT et al.,

Plaintiffs and Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,

Defendants and Appellees.

Order Enlarging Time to and Including December 20, 1917, to File Record and Docket Cause in Appellate Court.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the plaintiffs and appellants may have to and including the 20th day of December, 1917, to file the record on appeal and docket the said cause with the Clerk of the above-entitled court.

WM. W. MORROW,

Judge.

Dated: November 20, 1917. San Francisco, Cal.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth District. Clara M. Wight et al., Plaintiffs and Appellants, vs. Washoe County Bank, a Corporation et al., Defendants and Appellees. Order of Enlargement. Filed Nov. 19, 1917. F. D. Monckton, Clerk. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

No. 3091. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to and Including Dec. 20, 1917, to File Record thereof and to Docket Case. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

No. 3091.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CLARA M. WIGHT and OTIS B. WIGHT (Her Husband), and GERTRUDE M. GREGORY and T. T. C. GREGORY (Her Husband),
Appellants,

vs.

WASHOE COUNTY BANK (a Corporation) et al.,
Appellees.

APPELLANTS' BRIEF

MASTICK & PARTRIDGE and
ALAN C. VAN FLEET,
68 Post St., San Francisco, Cal.,
Attorneys for Appellants.

THE RECORDER COMPANY, 680 STEVENSON ST., S. F.

No. 3091.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CLARA M. WIGHT and OTIS B. WIGHT (Her Husband), and GERTRUDE M. GREGORY and T. T. C. GREGORY (Her Husband),
Appellants,

vs.

WASHOE COUNTY BANK (a Corporation) et al.,
Appellees.

APPELLANTS' BRIEF.

This action was brought by appellants as stockholders of the Estate of W. O'H. Martin, Inc., to compel the appellee, Washoe County Bank to transfer on its books fifty (50) shares of its stock standing in the name of Harry M. Martin, and also for certain accrued dividends. Suit was brought by these appellants as stockholders for the reason that the Estate Company refused to bring it.

THE FACTS.

W. O'H. Martin died in September, 1901. At the time of his death he was the owner of 300 shares of

the appellee, Washoe County Bank. These shares were distributed to his widow and children and shortly thereafter these heirs formed a corporation known as the Estate of W. O'H. Martin, Inc. The shares of stock were transferred to this corporation and on February 19, 1903, 300 shares stood in the name of the Estate Company and were represented by Certificate No. 106.

Shortly prior to that time Mrs. Martin, who owned seven-twelfths (7/12) of the stock of the Estate Company, spoke to various directors of the bank about having a representative upon its Board of Directors. The evidence is conflicting as to what she said. She says she was informed by them that all she would have to do would be to transfer some stock to Harry M. Martin so that he could appear on the books as a stockholder, but that the Estate Company would not have to part with the ownership of the shares. Harry M. Martin was not a stockholder in the Estate Company. The directors deny these conversations, but they do not deny that they knew that the Estate Company was the owner of these 300 shares prior to the transfer to Harry M. Martin. In any event, on the 9th of February, 1903, Mrs. Martin called at the bank and Mr. George Taylor, who was then assistant cashier and assistant secretary of the bank, accompanied her into the stockholders' room at the bank. There were present: Mrs. Martin, Harry M. Martin, Anne Martin and Mr. Taylor. Mrs. Martin got her safe deposit box in the bank and took out the certificate for the 300 shares. Mr. Taylor then made out two

new certificates, one for 250 shares in the name of the Estate Company, and one for 50 shares in the name of Harry M. Martin. He took these out into the body of the bank and they were signed by Mr. Ward, a vice-president, and Mr. Taylor then brought them back and signed both the 250 share certificate and the 50 share certificate with his own name as assistant secretary. Mrs. Martin then, in the presence of Mr. Taylor, handed the 50 share certificate to her son, Harry M. Martin, and her daughter, Anne Martin, then said it should be at once endorsed and handed back. Harry M. Martin endorsed it and immediately, in the presence of Mr. Taylor, returned it to his mother and she put it back in the safe deposit box of the Estate Company. On the next day Harry M. Martin was appointed a director of the bank to fill a vacancy created by the death of Director Lyman. At that meeting George Taylor was present, recorded the minutes and signed them as assistant secretary. Harry M. Martin remained a director until June, 1905, when he removed to Tonopah and bought 479 shares of the Nye County Mercantile Company. In 1906, Harry M. Martin wrote to Mr. Taylor, who was still assistant cashier, requesting a loan in the sum of $15,000 from the Washoe County Bank and offering as security his 479 shares of the Nye County Mercantile Company.

On October 9, 1906, the board of directors passed a resolution granting the loan to Harry M. Martin, to be secured by the Mercantile Company shares, and Harry M. Martin received the money and delivered to the bank, through Mr. Taylor, the regular form

by which he pledged as security for the loan his shares in the Nye County Mercantile Company. The value of the stock of the Nye County Mercantile Company was, at the time of the making of the loan, from $75,000, to $100,000. Under the agreement by which the Mercantile Company stock was pledged to the bank, the bank had the right, at any time, on non-payment, to sell the stock or to compel the deposit of additional security. The bank, however, never at any time attempted to sell this stock, nor in any manner to collect the amount due from Harry M. Martin.

On January 15, 1909, Mr. Taylor went to Tonopah and secured a renewal note from Harry M. Martin, again secured by a written pledge of the 479 shares of stock.

Up to the year 1909 the checks for the dividends declared upon the stock of the bank were sent to Harry M. Martin. He immediately endorsed them and delivered them or sent them to his mother and she re-endorsed them "Estate of W. O'H. Martin, Inc. by Louise W. Martin, President" and deposited them with the appellee, Washoe County Bank, and they were entered upon the book of the Estate Company as being credited to the corporation. After 1909, however, the checks, instead of being delivered to Mr. Martin, were always delivered to the Estate Company direct. In other words, though the checks were drawn to Harry M. Martin, they were not endorsed by him at all, but were endorsed by Mrs. Martin, "Harry M. Martin, Estate of W. O'H. Martin, Inc., by Louise W. Martin, President."

I.

The Bank Could Not Assert Its Alleged Lien Because It Had Notice That Harry M. Martin Was Not the Real Owner of the Stock.

It is undisputed that this stock has always, since the death of Mr. Martin, Sr., been the property of the W. O'H. Martin Estate. It is likewise undisputed that, *as a matter of fact,* the stock was transferred into the name of Harry M. Martin without consideration and for the sole purpose of qualifying him as a director, and that the certificate made out in his name was immediately, in the office of the bank, and in the presence of Mr. Taylor, its assistant cashier, endorsed by Mr. Martin, and returned to its real owner; that it was always thereafter in the possession of the Estate; that for a certain period of time the checks for dividends were delivered to Mr. Martin, and by him immediately endorsed to the Estate, and by the Estate deposited to its account; that for a period of about two years these checks were delivered to the Estate and by it deposited to its account.

The defense is based upon a by-law of the bank, in effect attempting to give it a lien upon its own stock for debts due from its stockholders. It is, however, undisputed that the loan for which the lien is claimed was in fact made upon the security of other stock pledged by Mr. Martin as collateral.

The evidence, which we maintain shows that the bank had notice, is as follows:

(a) The whole three hundred shares stood upon its books in the name of the Estate Company.

(b) Mrs. Martin, the principal owner of the stock of the Estate Company, spoke to various directors of the bank, informing them that her interests were so large that she did not feel safe without representation upon the board of directors. She says that at least one of them told her, in effect, that she could make her son a stockholder of record, without really parting with any of the stock. It is true that as to this conversation she is disputed; but in any event, there was enough in the circumstances to warrant the belief on the part of the directors that she was not really selling or giving any stock to her son, but only putting it in his name on the books so he could qualify as a director. When she made the actual transfer she told the assistant cashier that it was in pursuance of this prearrangement.

(c) The actual business was transacted with Mr. Taylor, the assistant cashier and secretary of the bank. He cancelled the old certificate and made out new ones —one for fifty shares in the name of Harry Martin, and one for two hundred and fifty shares in the name of the Estate Company. He likewise signed these certificates in his official capacity. At the very time these new certificates were issued in the offices of the bank and in the presence of this same Taylor, the officer who attended to it, Harry Martin endorsed the fifty-share certificate and delivered it to his mother and she put it in the Estate's safe deposit box.

(d) For a certain period of time, dividend checks

were sent to Mr. Martin. However, he always endorsed them over to the Estate and Mrs. Martin then endorsed them "W. O'H. Martin Estate, Inc. by Louise W. Martin, Pres.", and then deposited the checks in this same bank. Beginning in 1909, however, the dividend checks were delivered to Mrs. Martin direct, and were by her endorsed and deposited. The bank book of the Estate Company showed these deposits and what they were for.

(e) The loan for which the lien is claimed was made through Mr. Taylor. Harry Martin wrote to him, asking for the loan, and tendering the stock of the Mercantile Company as security. Mr. Taylor took this up with the directors and the loan was authorized. It was made upon the security of the Mercantile Company stock, and it is inconceivable that at this time, at least, Mr. Taylor could have failed to communicate to the other officers and directors the fact that Mr. Martin was not the real owner of stock of the bank.

(f) At the time the transfer was made, Miss Anne Martin said to her mother: "Mother, you had better have Harry endorse it right away, have it all complete before you put it in the box." This was in the presence of Mr. Taylor.

(g) Mr. Taylor was at the time of the trial still an officer and director of the bank. He was not, however, produced as a witness.

(h) In July, 1909, Mrs. Martin requested the directors to transfer the stock back to the Estate. Not a word was said then about a claim that they had made

the loan in the belief that Harry was the real owner of the stock. On the contrary, Mr. Bender merely said: "Mrs. Martin, I could not transfer it, but if you get two-thirds of the board you can have it transferred."

(i) The loan to Harry Martin was made in October, 1906. At that time the stock of the Mercantile Company was worth several times the amount of the loan. But in the panic of 1907 the Mercantile Company became practically insolvent. Yet, in January, 1909, the bank, without the least attempt to collect from Harry Martin, or any assertion whatever that they had a lien upon the bank stock, took a new note from him, again secured by a pledge agreement of the Mercantile Company stock. We think that their failure to assert their lien at this time shows clearly that they knew that the bank stock did not belong to him.

The Law.

Mr. Taylor was the officer who had charge of the very transaction of the transfer of the fifty shares. He was also the officer through whom the loan was made. Under such circumstances the law presumes that his knowledge was the knowledge of the bank.

Williams v. *Hasshagen,* 166 Cal. 393;
McKenney v. *Ellsworth,* 165 Cal. 326;
Zeis v. *Potter,* 105 Fed. 671;
7 Corpus Juris, 530.

It has also been held that where the cashier has in-

formation sufficient to put him upon inquiry, the bank is bound.

Groff v. *Stitzer,* 75 N. J. Eq. 452, 72 Atl. Rep. 970;
Kissam v. *Anderson,* 145 U. S. 435.

It is well settled that a provision in the by-laws or statutes, giving a corporation a lien on its own stock does not operate against stock owned by anyone but the debtor.

Mechanics Bank v. *Seton,* 1 Pet. 299.

II.

Mr. Taylor Was Acting Within the Scope of His Authority, and Any Knowledge He Had at the Time the Loan Was Made Was the Knowledge of the Bank.

When Harry Martin made the application for the loan, it was to Taylor. He, having knowledge that the bank stock did not belong to Harry, reported on the loan to the directors. Mr. Mapes, the president of the bank, testified:

> "A. We have a loan committee; the directors of the Washoe County Bank is a committee; the majority rules; the cashiers are instructed to make a certain loan, but not to exceed a certain amount; and it had generally been the custom for people making an application for a loan to have them make a statement of the conditions of the individual or corporation; then it is usually acted on by the board, and whoever that report was handed to —that might be handed to me or the cashier, or some of the members of the bank—employees—

but it is always generally acted on by the board.

"MR. PARTRIDGE: Q. When collateral is tendered as security, who investigates the collateral—whose duty is it in the bank to investigate the collateral?

"A. The whole board, or the majority of the board.

"THE COURT: Give that answer again, please.

"A. The committee.

"The duties of the cashier in general terms, and in a few words are: That they are to make small loans and look after the interests of the bank. Now, I don't want to he misconstrued with any question I answered. The cashiers nor the president alone has a right to make very large loans in the Washoe County Bank, but they do make them with the committee, which is the directors of the bank, and a majority rules."

The rule was stated by Judge Shiras, sitting in the Court of Appeals for the Eighth Circuit in the *City of Denver* v. *Sherret,* 88 Fed. 234, as follows:

> "In Thompson on the Law of Corporations (vol. 4, Sec. 5195) the rule is stated to be to the effect that, in order to bind the principal, the notice must be communicated to one whose duty it is 'to act for the principal upon the subject of the notice, or whose duty it is to communicate the information either to the principal or to the agent whose duty it was to act for him with regard to it.' Counsel for the electric company, in the brief submitted, state their view of the rule in the following terms: 'The general rule with reference to the question of notice is that notice to the agent is notice to the principal, if the agent comes to a knowledge of the facts while he is acting for the principal; but this rule is limited by the further rules that notice to the agent, to bind the principal, must be within the scope of the employment,' —and cite in support thereof the cases of the Dis-

tilled Spirits, 11 Wall. 356, and *Rogers* v. *Palmer,* 102 U. S. 263. In the former case it was said that 'the general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent's duty to communicate the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty'; and in the latter case it was held that knowledge obtained by an attorney when conducting a case for a client was imputable to the latter."

The general rule is also laid down by Thompson, in his work on Corporations, Vol. II, Section 1648 (Second Edition) as follows:

"NOTICE TO AGENT—DUTY TO ACT ON OR COMMUNICATE KNOWLEDGE TO PRINCIPAL.—It may be said generally that notice to the officer or agent of a corporation in due course of his employment in respect to a matter within the scope of his authority, or apparent authority, of such character that it becomes his duty to communicate the information to it, is notice to the corporation whether the officer or agent imparts to it such information or not. And this principle is peculiarly applicable to corporations, since the third person can communicate notice to the corporation in no other way than by notifying the agent of the corporation whose duty it is to receive and communicate it. The conclusion is, that notice to an agent in the absence of fraud or collusion with him, when acting for the corporation, must in every case be imputable to the corporation. But where the officer has acquired information in a private capacity, the rules impose no duty upon him to disclose such knowledge, and it will not be imputed to the corporation."

The same principles are enunciated in *Curtice* v. *Crawford County Bank,* 118 Fed. 390, where the facts were very similar to the case at bar. This latter case is cited with approval in *In re Virginia Hardwood Manufacturing Co.,* 139 Fed. 223. A very able review of the authorities is found in the opinion written by the Chief Justice of Alabama in *Birmingham Trust & Savings Co.* v. *Louisiana National Bank,* 13 Southern Rep. 112. We also quote principles as laid down in 2 Thompson on Corporations (Second Edition) Section 1672, as follows:

> "MATTERS WHICH THE OFFICERS OUGHT TO KNOW IMPUTABLE TO THE CORPORATION.—The circumstances which put a corporation upon inquiry as to the rights or equities of a third person, must be the same as those which will put an individual upon inquiry; otherwise the public would be at an enormous disadvantage, not only in dealing with corporations themselves, but in having their rights destroyed where others who are the trustees of such rights deal with corporations. The corporation will be charged with notice of matters affecting the corporation where its officers have knowledge of facts which would put a prudent person in inquiry that would lead to this knowledge. *The law will also impute to a corporation knowledge of facts which its directors ought to know, in the exercise of ordinary diligence in the discharge of their official duties, when the imputation of such knowledge to the corporation is necessary to protect the rights of third persons.* The directors are presumed to know that which it is their duty to know and which they have the means of knowing. Upon this principle, corporations are often charged with responsibility for the frauds of their ministerial officers. Thus, where the cashier of a

national bank, who was also the treasurer of a savings bank, secretly and fraudulently pledged, for the benefit of the national bank, certain securities belonging to the savings bank, and the securities were sold under the contract of pledge and lost to the savings bank, it was held that the savings bank might maintain an action against the national bank for damages for the conversion of the securities, and that the ignorance of the directors of the national bank, of the act of their cashier, was no defense to the action; since if they were indeed ignorant, their ignorance arose from their failure to perform their official duty."

III.

UNDER THE DOCTRINE OF THE MARSHALLING OF ASSETS, A CREDITOR CANNOT ASSERT A LIEN UPON THE PROPERTY OF A THIRD PERSON, WHERE HE HAS BY HIS OWN NEGLIGENCE SUFFERED OTHER PROPERTY, IN WHICH THE THIRD PARTY HAS NO INTEREST, TO BECOME VALUELESS.

It is perfectly apparent from the evidence that in making the loan to Mr. Martin, the bank relied solely upon his personal credit, and upon the stock of the Mercantile Trust Company pledged as security. Under the terms of the collateral agreement, attached to the note, the bank had the right to sell this stock at any time, and thus satisfy the debt. This stock was worth many times the amount of the loan. But instead of collecting its debt, the bank allowed it to run along, until the pledged stock became valueless. Under such circumstances, it has been held in nearly every state, that the loss must fall upon the one whose

negligence was the cause of it and not upon an innocent party. A typical case is *First National Bank* v. *Taylor,* 76 Pac. 425, where the Supreme Court of Kansas says and quotes:

> "The general rule enforced in equity is that where one creditor is secured by mortgage on several pieces of property, while another creditor is secured by a junior mortgage on only a part of the property, the prior creditor, when chargeable with actual notice of the rights of the junior creditor, is bound to exhaust his security on the property not covered by the junior lien, and that he must account to the junior lien holder if he releases his security on, or pays over to the mortgagor, the proceeds of the property not covered by the lien of the junior mortgagee, after actual notice of the junior lien. *Burnham* v. *Citizens' Bank,* 55 Kans. 545, 40 Pac. 912; *McLean* v. *La Fayette Bank* 4 McLean, 430 Fed. Cas. No. 8889; *Dunlap* v. *Dunseth,* 81 Mo. App. 17; *Aldrich* v. *Cooper,* 8 Vesey, 282; *Turner* v. *Flenniken,* 164 Pa. 469, 30 Atl. 486, 44 Am. St. Rep. 624; 2 Jones on Mortgages, sec. 1628."

IV.

The Statute of Limitations Has Long Since Run Against the Original Debt of the Bank, and Harry Martin Could Not Suspend the Running of the Statute so as to Extend the Lien Upon Property Which in Fact Belonged to a Third Party.

The debt, for which the defendant bank claim a lien, was created in October, 1906. The evidence is not clear whether there was a note at that time—but in any event, the statute has long since run. In Janu-

ary, 1909, however, Mr. Martin executed the note and collateral agreement which is in evidence. It is, however, well settled that a debtor cannot toll the statute so as to prolong a lien upon the property of another. A typical case is

Wood v. *Goodfellow,* 43 Cal. 188,

where the Supreme Court of California says:

> "But it is the settled doctrine of this court, as will be seen from the authorities above cited, that when third persons have subsequently acquired interests in the mortgaged property, they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the state. In either case it is the sole act of the mortgagor, performed at a time when he had lost his rightful control over the property, and when other interests had intervened, which ought not to be dependent for their protection on the conduct of the mortgagor. When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment, under the mortgage, which is a contract in writing, by which the property is pledged as a security for the debt. The mortgage, in such a case, has the same effect in law as if it had been

originally made, as a separate instrument, by the parties succeeding to the rights of the mortgagor to secure his debt. If A make a mortgage on his property to B to secure a debt owing from C the action to foreclose the mortgage must be brought within four years from the time when the debt became due. The time could not be prolonged by any stipulation between B and C to which A was not privy. But when the four years were about to expire, could C under our law, indefinitely postpone the bar of the statute, and render it nugatory as to A by absenting himself from the state, and ever returning? The argument of the plaintiff's counsel necessarily leads to this result. But we have not, heretofore, so interpreted the statute. On the contrary, we have uniformly held in analogous cases that the mortgage, as contradistinguished from the mortgage debt, in such cases is to be deemed a contract in writing in the sense of the statute, on which the action must be brought within four years from the time when the action would lie, in order to avoid the bar of the statute. If we had any doubt, on reason or authority, whether the rule is proper, it has been too long established in this state to be now disturbed."

That case is mentioned as stating the correct doctrine in *Bassett* v. *Monte Cristo Mining Co.,* 15 Nev. 300, in an opinion written by Judge Beatty.

It is equally well settled that if the debt is barred by the statute, a lien cannot be foreclosed.

Ewell v. *Daggs,* 108 U. S. 143; 27 L. Ed. 682.

V.

The opinion of the learned Judge of the District Court, in the last analysis, is based upon the proposition that there is no showing that Mr. Taylor was

aware of what was happening right there before him, or heard the conversation that was carried on in his presence. We submit that:

1. There is a strong presumption that a person hears a conversation at which he is present.

2. If he did not hear or see what was happening, it would have been easy enough for the bank to have produced him.

3. It is undisputed that he was told that the shares were being transferred to make Mr. Martin a director, in pursuance of a previous arrangement—and it is inconceivable that he was right there in the room, and did not see Mr. Martin endorse the certificate and deliver it to his mother. Having seen this, it was his duty, inasmuch as he knew Mr. Martin was to be a director, to make inquiry as to the reason of the transfer. But, of course, he knew all the circumstances.

We respectfully submit that the decree should be reversed.

ALAN C. VAN FLEET,
MASTICK & PARTRIDGE,

Attorneys for Appellants.

No. 3091. 3

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLARA M. WIGHT and OTIS B. WIGHT (her husband), and GERTRUDE M. GREGORY and T. T. C. GREGORY (her husband),

Appellants,

vs.

WASHOE COUNTY BANK (a Corporation), et al.,

Appellees.

APPELLEES' BRIEF

CHENEY, DOWNER, PRICE & HAWKINS,
Reno, Nevada,
Attorneys for Appellees.

Filed this.....day of April, A. D. 1918.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

The James H. Barry Co., San Francisco.

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APPELLEES' BRIEF.

The appellants' statement of the case either does not mention, or fails to give, due prominence to many important facts shown by the record, which will be referred to in the course of this discussion.

THIS COURT SHOULD NOT ENTERTAIN THIS SUIT BECAUSE IT IS FOUNDED ON AN ALLEGED ILLEGAL AGREEMENT.

It is a maxim that he who comes into a court of equity must come with clean hands. No person who bases his right upon an illegal contract, or one against

public policy will be heard to complain when he seeks relief from a situation created thereby.

In the amended complaint, paragraph XII, the plaintiff alleges that the stock in question was transferred by the Martin Estate Company into the name of Harry M. Martin "for the purpose only of qualifying the said Harry M. Martin to become a director of the said defendant Washoe County Bank."

The laws of Nevada at all times in controversy in this case required that a director of a corporation be a stockholder.

1 *Revised Laws of Nev.,* Sec. 1223.

By repeated decisions of the Supreme Court of Nevada, it is established that the necessity that a director be a stockholder is imperative. Not only is it necessary that a director be a stockholder, but it is also held that when a director ceases to be a stockholder, he *ipso facto* ceases to be a director. Not only is it illegal for one not a genuine stockholder to be a director of a corporation, but it is also against public policy. Only those who have a genuine and substantial financial interest in a corporation should be entrusted with a share in its management.

If the alleged contract or arrangement between the Martin Estate Company and Harry M. Martin, with reference to the fifty shares of stock in question, is either inherently illegal or is against public policy, these plaintiffs can obtain no relief in this case.

In order to recover in this case it is necessary for the plaintiffs to prove this illegal agreement between the Martin Estate Company and Harry M. Martin, and also to prove that the bank had notice of it.

The findings of the Court, after an analysis of the testimony, were against the plaintiffs on this contention, but it is still the duty of counsel to direct the attention of the Court to the fact that the plaintiffs' case is founded on an illegal agreement in order that the Court itself may be advised of the nature of the contract it is expected to enforce and take such action as to it may seem fit.

The plaintiffs' complaint alleges in effect that Mr. Harry M. Martin in fact was not the owner of the fifty shares of stock in question, but that it at all times belonged to the Martin Estate Company. The stock was transferred to Harry M. Martin to cause it to appear that he was a genuine stockholder in the Bank, whereas, in truth and in fact, he was not. He was to be purely and simply a "dummy" director. If this be true, a court of equity will leave the parties to such a transaction exactly where it finds them.

The Courts of the United States are substantially unanimous upon the proposition that there can be no recovery upon an illegal contract.

We cannot agree with the contention that this agreement pleaded in the complaint was not illegal and even fraudulent. The business success and financial standing of a bank rests upon the confidence which

the public has in its affairs being entrusted to the management of those who are interested in its welfare. To allege and publicly proclaim that the managing officers of a bank have been party to an agreement for the election of a "dummy" director, of itself would seriously impair the Bank's standing, and when, in addition to this, the fact that the director is a "dummy" is concealed and he is permitted not only himself to vote the stock at stockholders' meetings as a *bona fide* stockholder, but also the party who makes this charge appears as his proxy and votes that stock as being the stock of Harry M. Martin, it is such a deception and misrepresentation to the other stockholders and such a suppression of the truth as to constitute a fraud upon the Bank and its stockholders. If it was legal for the Bank to have one "dummy" director, it would likewise be legal for it to have seven, the entire Board. In such case the entire management of the Bank would be entrusted to people who had no pecuniary interest in its welfare in disregard of the rights and interests of depositors and stockholders. The legislative requirement that a director should be a stockholder declares the public policy to be that the affairs of a Bank shall be controlled by those who are interested in its welfare.

Surely the suggestion of the trial judge that these plaintiffs, suing as stockholders of the Martin Estate Company to enforce an agreement alleged to have been made by the Martin Estate Company for the benefit

of the Martin Estate Company, have a different standing in this suit than Martin Estate Company, must have been inadvertently made.

According to the contentions of the plaintiffs, the transfer of this fifty shares of stock to Harry M. Martin was simply an idle ceremony. If their statement is true, and it is the basis of their case, Harry M. Martin was not a stockholder in the Bank at the time he was chosen as a director. It should be remembered that this is not an action of *quo warranto* to test the legality of corporate action by the Bank on the ground that it was brought about through the action of a director illegally elected. It is an appeal to a Court of Equity by a participant in an illegal transaction for relief from its consequences.

The Federal Courts have never deviated from the rule that denies recovery to a litigant who bases his cause of action upon an illegal contract when, in order to recover, he must prove the contract. It is the duty of Courts, so the decisions say, to enforce the law and in no manner to countenance the breaking of the law.

Bank of the U. S. vs. *Owens, et al.,* 2 Peters, 537.

We quote briefly from this decision:

"The question then is, whether such contracts are void in law, upon general principles.

"The answer would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are insti-

tuted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law?

"To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade.

"There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal."

Pullman Palace Car Co. vs. *Central Transportation Co.,* 171 U. S., 137;
Primeau vs. *Granfield,* 193 Fed., 911.

The Supreme Court of Nevada takes the same ground as the Federal Courts.

Gaston vs. *Drake,* 14 Nev., 175;
Drexler vs. *Tyrrell,* 15 Nev., 114-31-34;
Peterson vs. *Brown,* 17 Nev., 172-7.

We think the case at bar comes within the decision of the Court of Appeals of the State of New York where the Court uses this language:

"When we consider the provisions of the statute and the by-law over against the very general practice of qualifying persons for the offices of directors or trustees in stock corporations, it is going quite far enough to hold that when a transfer of stock is made for that purpose in good faith, and the transferee actually holds the stock during his incumbency of office, such transferee is a stockholder, within the purview of the law. But that is not the case at bar. When Trommer, Strauss, and Kugel-

man took their respective assignments of stock, it was with no thought of holding it, even until they were elected; for they at once retransferred the stock to the owner. It was simply a fictitious transfer, by which it was thought to comply with the naked letter of the law. . . .

"It seems to us to be going quite far enough to permit a person to become qualified for the office of director or trustee in a stock corporation by the mere transfer to him of a sufficient number of the shares of its stock, if he actually takes and holds it during his term of office. To go further would be to place a premium upon fictitious and colorable transactions designed in form to comply with the law and in fact to defeat its commands."

In re George Ringler & Co., 204 N. Y., page 30, 97 N. E., 593.

Of course, this Court will confine its review to the errors assigned by the appellants. From that assignment (Tr., p. 64) it appears that only two errors are relied upon by the appellants on this appeal, namely:

First—That the Washoe County Bank, before it made its loan to H. M. Martin, had notice that the fifty shares of bank stock, standing on the books of the Bank in the name of Harry M. Martin, was not his stock but the stock and property of the Estate of W. O'H. Martin, Incorporated;

Second—That the District Court erred in holding that the failure of the Washoe County Bank to produce George H. Taylor, its Assistant Cashier, as a witness, did not create a presumption unfavorable to

said Bank for the reason that said Taylor, though available to both plaintiffs and defendants as a witness, was a person hostile to said plaintiffs.

THE WASHOE COUNTY BANK, WHEN IT MADE ITS LOAN TO HARRY M. MARTIN, HAD NO NOTICE OF THE CLAIMS OR EQUITIES OF THE MARTIN ESTATE COMPANY.

In the Fall of 1906, Harry M. Martin, who had formerly been a Director of the Bank (Tr., p. 150), had resigned and moved from Reno to Tonopah, and was then indebted to the Bank over Twenty-two Hundred ($2200.00) Dollars (Tr., p. 153), and desiring to get a further loan from the Bank, wrote to George H. Taylor (Tr., pp. 124, 150), at which time said Taylor was the confidential agent and bookkeeper of the Martin Estate Company (Tr., pp. 106, 108, 128), requesting him to get a loan from the Bank for Harry M. Martin, to which Mr. Taylor replied that it would be satisfactory.

On November 24th, 1906, a loan of Fifteen Thousand ($15,000.00) Dollars by the Bank to Harry M. Martin was allowed by the Board of Directors and on November 24th, 1906, Harry M. Martin gave his note to the Bank for Seventeen Thousand Five Hundred ($17,500.00) Dollars, and in 1909 he gave the Bank a renewal note for the principal and interest, amounting to Twenty Thousand One Hundred and Fifty-one Dollars and Sixty-four Cents ($20,151.64),

no part of which has ever been paid (Tr., pp. 125, 152, 153, 154).

A By-Law of the Bank provides that no transfer of stock shall be made upon the books of the corporation until after the payment of all indebtedness due to the banking corporation by the persons in whose name the stock stands on the books of the corporation, except with the consent in writing of the President. This provision of the By-Laws was printed upon each certificate of stock issued by the corporation (Tr., pp. 18, 152).

It is true that it has been held that a regulation which provided that

> "No such stock shall be transferred, the holder thereof being indebted to the Bank, until such debt can be satisfied."

did not create a lien, when the Bank knew that the holder of the stock was not the real owner.

Mechanics Bank vs. *Seton,* 1 Pet., 308.

The By-Law to be construed in this case is materially different from the statute before the Court in the Seton case. The manifest purpose of the Washoe County Bank in adopting the By-Law in question was to make the test, not whether the person for whose indebtedness the Bank claimed a lien was the *holder* of the stock, but solely whether it *stood* upon the *books* of the Company *in his name.* It thereby gave notice to every stockholder that if he permitted any of his

stock to stand upon the books of the Company *in the name of another,* that stock was liable and the Bank had a lien upon it for the debt of the person in whose name it stood, and that until that debt was paid, or the consent provided for in the By-Laws obtained, that stock could not be transferred.

The Bank's stockholders had the right to make this By-Law and create a lien on the stock for any indebtedness of the person in whose name it stood on the books of the Company.

Cutting's Compiled Laws (Nevada), Sec. 869;
1 *Boles on Banking,* Sec. 24;
Pendergast vs. *Bank,* 2 Sawyer, 109; 19 Fed. cases, 135.

Stockholders are conclusively presumed to know the By-Laws of the Bank.

3 *Clark and Marshall on Corporations,* Sec. 577, p. 1763;
Jennings vs. *Bank of California,* 21 Pac., 852.

The By-Law and stock certificate notified the Martin Estate Company that if they permitted that stock to remain upon the books of the Bank *in the name of Harry Martin,* whether he had any interest therein or not, or whether the Bank knew that he had any interest therein or not, it would still be subject to the Bank's lien for any debt of Harry M. Martin, and that the Bank was without authority to transfer

it until that indebtedness was paid, unless he obtained the written consent of the President. Such a provision enabled the Bank to rely solely upon its record to ascertain for whose indebtedness it had a lien upon the stock, and may wisely have been intended to relieve the Bank from all controversies respecting the ownership of the stock.

The testimony is clear that this stock was placed in Harry Martin's name on the books of the Bank at the request and for the sole benefit of the Martin Estate Company. Having received the benefit of placing this stock on the books of the Bank in Harry Martin's name, it ought not to complain if it had to bear the consequences of so doing, especially when the situation is of their own creation.

The Bank claims that it had no notice before it made the loan (Tr., pp. 14, 15), and the trial Court so found (Tr., p. 50).

Upon this point there is a direct conflict of testimony. Mrs. Martin, the mother of Harry Martin, and the President and principal stockholder of the Martin Estate Company, testified that she had conversations, in 1903, with Messrs. Mapes, Bender and Rowland, who were then officers and directors of the Washoe County Bank, by which they agreed, or consented, that Harry Martin might be appointed a director of the Bank if she caused stock of the Bank to stand in his name upon the books of the Company without his being the real owner of the stock. Her

testimony is not only without corroboration, but is explicitly denied by each of these three gentlemen who state that they never knew that the stock standing in Harry Martin's name did not belong to him or was claimed to be owned by the Martin Estate Company until 1909, or later, and that they never consented and would not have permitted Harry Martin to be appointed or elected as a director of the Washoe County Bank if they had supposed, or had any knowledge, that he was not the real owner of that stock (Tr., pp. 150, 151, 156, 157).

Mrs. Martin testified, with equal positiveness, that the only reason why she put as much as fifty shares of stock in the name of Harry Martin, to qualify him as a director, was that the three hundred shares of stock which the Martin Estate Company then had in the Washoe County Bank was represented by two certificates, one for two hundred and fifty shares, and one for fifty shares, and that, as a matter of convenience, she had the certificate for fifty shares transferred to the name of Harry M. Martin (Tr., pp. 88, 89, 90, 91, 118). But it became very manifest that her memory was not reliable when it was shown by the books of the Bank that when she caused the fifty shares of stock to be put in the name of Harry M. Martin all the stock theretofore owned by the Martin Estate Company was represented by one certificate of three hundred shares, which, over her own signature, she that day surrendered and had cancelled and

caused two new certificates to be issued, one for two hundred and fifty shares in the name of the Estate of W. O'H. Martin, Incorporated, and the other for fifty shares in the name of Harry M. Martin (Tr., pp. 146, 147).

It must, therefore, be manifest to this Court that the findings of the trial Court that the Bank did not have notice of the claim of the Martin Estate Company to the stock in question is sustained by the great preponderance of the testimony. The rule of this Court, in reviewing findings upon conflicting testimony, has been recently stated with great clearness—

> "The trial court's findings in a suit in equity are presumptively correct, and will not be disturbed on appeal, unless an obvious error has intervened in the application of the law, or serious or important mistake has been made in consideration of the evidence especially in a case in which the testimony was taken in open court, so that the trial court had the opportunity of observing the demeanor of the witnesses, while the appellate court has before it only a condensed printed statement of the evidence."

Tobey vs. *Kilbourne,* 222 Fed., 760.

This rule of decision is equally applicable under the new equity rules.

American Rotary Valve Co. vs. *Moorehead,* 226 Fed., 202.

EVEN IF GEORGE H. TAYLOR, IN 1903, HAD NOTICE THAT HARRY M. MARTIN IMMEDIATELY ENDORSED THIS CERTIFICATE OF STOCK AND DELIVERED IT TO HIS MOTHER, THE BANK WAS NOT CHARGEABLE WITH NOTICE OF THAT FACT WHEN IT MADE THE LOAN TO HARRY M. MARTIN.

Neither George H. Taylor nor Fred Stadtmuller became directors of the Washoe County Bank until August, 1909 (Tr., p. 151).

When the Bank made its loan to Harry Martin in the Fall of 1906, George H. Taylor was the confidential agent and bookkeeper of the Martin Estate Company (Tr., pp. 106, 108, 128).

Harry Martin requested George H. Taylor, the confidential agent of the Martins, to make application to the Bank for a loan. This was three and one-half years after the events which it is claimed gave Taylor notice that this stock did not belong to Harry Martin. It is not to be presumed that George H. Taylor, while acting for Harry Martin in securing this loan for him from the Bank, would disclose to the Board of Directors, who alone had authority to make this loan, the information, if any such he possessed, that Harry Martin was not the owner of this stock, because to disclose that information would be in violation of the duty which he owed to the Martin Estate Company and would tend to defeat the very purpose of his application.

The rule that a principal is bound by the knowl-

edge of his agent, acquired in the transaction, or so soon before it that it may be presumed to be remembered by him when subsequently acting for his principal, is subject to the qualification that the information was not obtained under such conditions that it would be a breach of confidence for him to disclose it to his principal, or when, from his relation with the subject-matter, it will not be expected that he will disclose it.

The Distilled Spirits, 11 Wall., 356;
Bank vs. *Thompson,* 118 Fed., 798;
George vs. *Butler,* 50 Pac., 1032;
Melms vs. *Pabst Brew. Co.,* 66 N. W., 522;
Mechem on Agency, Sec. 721.

When Mrs. Martin, in 1903, applied to George H. Taylor, who was then the Assistant Secretary of the Washoe County Bank, to have these fifty shares of stock transferred to the name of Harry M. Martin to qualify him to become a Director of the Bank, the only duty which Taylor had to perform, as an officer of the Bank, was, as Assistant Secretary (for he was then no other officer), to make the proper entries of the transfer and issue the new certificate. In making that transfer he acted for the Bank, but when the transfer was made and the certificate delivered to Harry M. Martin, the transaction was closed. He was in no way concerned in what Harry M. Martin did with the certificate nor the private dealings be-

tween Harry Martin and the other members of his family. The trial judge has very clearly and satisfactorily reviewed this testimony (See Tr., pp. 48-50).

We submit there is no evidence justifying a finding that Taylor at that time knew that Harry Martin was not the owner of this stock or that the Bank was chargeable, when it made the loan in 1906, with any knowledge which Taylor may have had concerning the ownership of this stock in 1903, nor is there any presumption that if he had any such knowledge he conveyed it to the Board of Directors at or before the time the loan was made.

This case concerns a corporation organized under the laws of the State of Nevada. What constitutes notice to a Nevada corporation should be determined by the decisions of that State and, in order to charge the Bank with notice, it must, under those decisions, be shown that *a majority of the Board of Directors,* when they authorized this loan to Harry Martin, had knowledge that he did not own the stock.

Yellow Jacket S. M. Co. vs. *Stevenson,* 5 Nev., 231-233;
Hillyer vs. *The Overman M. Co.,* 6 Nev., 51, 57;
Edwards vs. *Carson Water Co.,* 21 Nev., 483.

Much evidence was offered and received, against, and subject to the objection of the Washoe County Bank, of what took place in 1909 respecting the pay-

ment of dividends, and the conduct of Taylor and Stadtmuller, for the purpose of showing that the Bank had notice, or had waived its right to a lien upon this stock. The objections were made upon the ground that notice to the Bank must have preceded the making of the loan in order to affect its lien and that what took place nearly three years afterwards was wholly incompetent and immaterial, and that under the By-Laws, neither Mr. Bender, Mr. Taylor nor Mr. Stadtmuller had any power to waive the lien of the Bank, the By-Laws expressly providing that the only waiver authorized to be made was the written consent of the President (Tr., pp. 98, 100, 101, 111, 113, 114, 115, 127).

The Answer avers, and the record shows, that the Martin Estate Company never made any demand to have the stock in question transferred from Harry M. Martin to it until July, 1909 (Tr., pp. 16, 119, 151), before which time Mrs. Martin became anxious about the condition of her son's business at Tonopah, and sent George H. Taylor, at her own expense, to investigate it, he being at that time in her employ (Tr., pp. 122, 136).

It was not until after Mrs. Martin had been advised by her nephew, Fred Stadtmuller, that Harry Martin's creditors knew this stock was standing in his name, did she ever make any claim to the Bank that this stock belonged to the Martin Estate Company and that she wanted it transferred (Tr., p. 99).

Before this time the panic came to Tonopah and the property of the Nye County Mercantile Company (the stock of which Company Harry M. Martin had pledged as collateral security for his debt to the Bank) was mortgaged to secure its creditors and, by foreclosure and sale under that mortgage, this collateral security became worthless (Tr., pp. 50, 129, 130). Before that time a dividend had been declared by the Nye County Mercantile Company upon its stock of which, however, the Bank had not received notice. Mrs. Martin also held stock in that Company. The dividend declared upon her stock she received, but that declared upon the stock held by the Bank as security for Harry Martin's loan was credited to surplus account because it did not have ready money to pay it (Tr., pp. 129, 130).

The agreement attached to Martin's note to the Bank expressly said the Bank should not be liable for failure to collect the security, or to sue therefor (Tr., p. 126).

The answer of the Martin Estate Company, in reference to these fifty shares of stock, alleges:

> "That until July, 1909, the dividends were paid in checks drawn to the order of Harry M. Martin, which were sent to him, by him endorsed, and credited to this defendant" (Tr., p. 25).

and the testimony is that after that time, and until 1911 (since which time the Bank has applied the dividend upon this stock to the credit of Martin's

debt to it), the dividend checks were made payable to the order of Harry Martin and handed to Fred Stadtmuller with instructions to mail them to Harry Martin, although the instructions seem not to have been obeyed (Tr., pp. 94, 154).

The fact that the Bank for some time permitted Harry Martin to receive the dividends upon this stock and that the Martin Estate Company got the benefit of it was to their advantage and that the Bank did not assert its lien as soon as it might, certainly raises no equity on behalf of the Estate Company. It was benefited and not prejudiced by it.

It is clear that the taking of additional security by the Bank for the payment of Harry Martin's indebtedness was not a waiver of its lien on this stock. The law to that effect is very clearly stated by Justice Story in *Union Bank* vs. *Laird,* 2 Wheaton, 393-394.

See also

1 *Boles on Banking,* Sec. 27, page 90;
3 *Clark and Marshall on Corporation,* 771;
Kenton Ins. Company vs. *Bowman,* 1 S. W., 717-720;
Germ. Natl. Bank vs. *Ky. Trust Co.,* 40 S. W., 458;
Kilpatrick vs. *K. C. & B. H. Ry. Co.* (Neb.), 57 N. W., 664-671.

The mere failure to assert a lien is not a waiver of it. In order to constitute a waiver, there must be

either an intention to waive, or such conduct as will estop the person having the lien from claiming it.

3 *Clark and Marshall on Corporations,* 171.

When the request was made to have this stock re-transferred to the Martin Estate Company, the indebtedness of Martin to the Bank and its lien under the By-Laws upon this stock were given as the reason why the transfer could not be made (Tr., pp. 112, 122, 150).

The certificate provided how the waiver could be obtained. No other waiver could rightfully be made. A party claiming a waiver has the burden of proving it, and the evidence should make a clear case.

40 *Ency. of Evidence,* page 269.

Not only did the Martin Estate Company cause this stock to stand upon the books of the Bank in the name of Harry M. Martin and not make any claim of ownership or demand for its transfer until after the other security held by the Bank had become worthless, and it became apprehensive that the stock might be seized by his creditors, but it also knew that this stock was being voted at the stockholders' meeting either by Harry Martin in person, or by his proxy, as being the stock of Harry Martin, and at a meeting of the stockholders held July 9th, 1907 (Tr., pp. 131, 132), Mrs. Martin represented this stock as the proxy of Harry Martin and, at other meetings held in July,

1909, and July, 1910, the fifty shares of stock standing in the name of Harry M. Martin were represented by his proxy to the Martin Estate Company (Tr., pp. 132, 133).

It is assigned as error that the trial Court did not indulge in a presumption that if George Taylor had been called, his testimony would have been unfavorable to the Bank. How this constitutes an error at law which can be made the basis of an assignment does not appear. It is, however, shown by the record that George H. Taylor was not only always friendly to the Martins and for many years their confidential agent, but that in 1909 he told Mrs. Martin "that if it ever came to a law suit, he would have to testify for the W. O'H. Martin Estate" (Tr., pp. 117, 128, 106, 108). It thus clearly appears that George H. Taylor was not hostile and was equally available by the Martin Estate Company as a witness in this behalf, and had said that he would have to be such, in the event of a law suit. In such a case the rule is very clear, that there is no presumption that his testimony would be adverse to the Bank.

> *Greenleaf on Evidence,* 16th ed., Sec. 195(b); *Jones on Evidence,* Sec. 21.

Notwithstanding the points are not covered by the assignment of error the appellant has argued questions of the Statutes of Limitation and marshaling of assets. It should be sufficient to say that the record

does not present these questions because they are not assigned as error, but the doctrine of the marshaling of assets is wholly inapplicable and the rule in reference to the Statutes of Limitation invoked by the appellant and supported in the main by a California decision, is not the rule in Nevada.

Richards vs. *Hutchinson,* 18 Nev., 215;
Harding vs. *Elkins,* 29 Nev., 329;
Hanchett vs. *Blair,* 100 Fed., 817.

It is respectfully submitted that the judgment should be affirmed.

CHENEY, DOWNER, PRICE,
& HAWKINS,
Attorneys for Appellees.

No. 3092

United States
Circuit Court of Appeals

For the Ninth Circuit.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Plaintiff in Error,

vs.

ALEXANDER MATSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index. Page

Index. Page

Names and Addresses of Attorneys.

FRANK D. OAKLEY, Esquire, 408 Perkins Building, Tacoma, Washington,
Attorney for Plaintiff in Error.

RALPH WOODS, Esquire, 717 Tacoma Building, Tacoma, Washington,

CHARLES L. WESTCOTT, Esquire, 719 Tacoma Building, Tacoma, Washington,
Attorneys for Defendant in Error. [1*]

In the United States District Court, Western District of Washington, Southern Division.

No. 1980.

ALEXANDER MATSON,
Plaintiff,

vs.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court.

You will please prepare a transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the Writ of Error to said Court, including the following pleadings, proceedings and papers, to wit:

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*Page-number appearing at foot of page of original certified Transcript of Record.

Amended Complaint.
Answer to Amended Complaint.
Order Removing Cause to Above Court.
Reply to Answer.
Defendant's Requested Instructions.
Verdict.
Judgment.
Petition for New Trial.
Order Overruling Motion for New Trial.
Order Extending Time for Filing Proposed Bill of Exceptions.
Bill of Exceptions as Settled by the Court, with Order Settling Same.
General Orders Continuing Court Matters Over Term. [2]
Assignment of Errors.
Petition for Writ of Errors.
Order Allowing Writ of Error.
Bond on Writ of Error and Approval of Same.
Order Extending Time for Filing Transcript on Writ of Error.
Omitting all Captions and Verifications.

F. D. OAKLEY,
Attorney for Plaintiff in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [3]

Amended Complaint.

The above-named plaintiff complains of the above-named defendant and alleges:

I.

That the said plaintiff is a resident of Tacoma, Pierce County, Washington of lawful age, and prior to the happening of the matters and things hereinafter referred to was a strong and able-bodied man, earning and capable of earning Three ($3.00) Dollars per day.

II.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and is a common carrier of passengers, and as such common carrier maintains and operates an electric railway in Pierce County, Washington, and does business therein and has a station on said line at which it receives and delivers passengers at a place known as Pacific City.

III.

That on the 30th day of March 1915, plaintiff went to the station of the defendant, at Pacific City, for the purpose of boarding the train of defendant for transportation to Tacoma; That the said train, arriving at the said station, stopped and discharged one passenger, and that thereupon, while the said train was at a standstill, plaintiff attempted to board the same, but that while he was in the act of boarding the said train it was suddenly started by a jerk which threw plaintiff under the wheels of the rear car of said train, which ran over his left foot and mangled and cut a part thereof so that it became necessary that a part of the foot should be amputated and removed. [4]

IV.

That the said injury to plaintiff was caused by the negligent starting of the said train by defendant, its agents and servants, without warning to him, while plaintiff was in the act of boarding the same and while he was holding one of the rods provided for the purpose of aiding and assisting in the boarding of the said train, and to the further negligence of the defendant in not permitting the train to remain stationary a sufficient length of time for plaintiff to board it, and in not providing some means whereby the said train would remain stationary long enough for the plaintiff to board it, and in not providing for some means by which the said train would be kept stationary while it was being boarded by plaintiff; and to the further negligence of the defendant in not providing some means by which the motorman or the operator of the said train was informed and knew that the plaintiff was in the act of boarding it.

V.

Plaintiff further alleges that by reason of the said accident and injury to him he has suffered great mental and bodily pain and suffering and that he will continue to suffer the same during the balance of his life time; that by reason of the mashing and crushing of a part of his foot and the subsequent amputation thereof, he is now permanently crippled and that he will be a cripple for the balance of his life; that he is unable to engage in any sort of labor and is unable to walk without the aid of crutches or a stick, and that he is unable to stand with his weight, or any considerable part thereof, resting on

his crippled foot without great pain and suffering, all of which disabilities and pain will continue in the future and be permanent. [5]

WHEREFORE, plaintiff alleges that he has been damaged in the sum of Ten Thousand ($10,000.00) Dollars and prays judgment against the said defendant for said sum, together with his costs and disbursements in this behalf expended.

RALPH WOODS,
HUDSON, HOLT & HARMON,
Attorneys for Plaintiff.

State of Washington,
County of Pierce,—ss.

Alexander Matson, being first duly sworn, deposes and says: That he is the plaintiff named in the above and foregoing amended complaint; that he has read the same, knows the contents thereof and believes the same to be true.

ALEXANDER MATSON.

Subscribed and sworn to before me this 21st day of January, 1916.

RALPH WOODS,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Consent is given to the filing hereof of service by receipt of a copy hereof admitted this 21st day of Jan., 1916.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Def.

Filed in Superior Court. Jan. 27, 1916. E. F. McKenzie, Clerk. By G. F. M., Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [6]

Answer to Amended Complaint.

The defendant above named, for answer to plaintiff's amended complaint herein, alleges:

I.

For answer to Paragraph I of the amended complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts alleged therein, and therefore denies the same.

II.

For answer to Paragraphs 3, 4, and 5 of said amended complaint, this defendant denies each and every allegation therein contained, and particularly denies that the plaintiff was damaged in the sum of Ten Thousand Dollars ($10,000.00), or in any other sum whatever.

Further answering, and as a further, separate and first affirmative defense, this defendant alleges:

I.

That if the plaintiff sustained any injuries at the time and place alleged in his amended complaint herein, concerning which this defendant has no information, and therefore denies the same, the same were caused and occasioned by reason of the careless and negligent conduct of the plaintiff himself, and

not otherwise, in that he heedlessly and recklessly undertook to board the said train in an improper manner while the same was in motion, and at the time said train was put in motion neither plaintiff nor any other passenger was on the platform of said station or attempting to board the said train when the same was put in motion, and that if plaintiff attempted to board said train he did so after the same was put in motion, and after the doors and vestibule of said train had been [7] closed, and that plaintiff failed to exercise his mental faculties in any way to observe, avoid, and escape the risks and dangers of attempting to board a moving train, and that he failed to take proper care to provide for his personal safety.

WHEREFORE defendant prays that this case be dismissed, and that it recover its costs and disbursements herein expended.

F. D. OAKLEY,
Attorney for Defendant.

Copy of Answer received this 18 day of May, 1916.
RALPH WOODS.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. May 18, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [8]

Order Approving Bond and Removing Cause to United States District Court.

(From the Superior Court of the State of Washington for Pierce County.)

This cause coming on duly and regularly to be

heard this 26th day of January, 1916, upon the petition of the defendant, Puget Sound Electric Railway Company, for the removal of this cause from this court to the United States District Court for the Western District of Washington, Southern Division, and it appearing to the Court that written notice of this petition and hearing and of the bond for removal filed herein has been given to the plaintiff herein prior to the filing of said petition and bond, and it appearing to the Court from said petition that said suit is entirely between citizens of different states, and that the amount in controversy in said action exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and the petitioner having filed and tendered with its said petition a bond with good and sufficient surety in the sum of Five Hundred Dollars ($500.00) conditioned as required by law, and being advised in the premises:

IT IS ORDERED that the said bond be and the same is hereby approved; that this Court proceed no further in this cause, and that the same be and hereby is removed to the District Court of the United States, for the Western District of Washington, Southern Division, and that the Clerk of this Court be and he hereby is ordered and directed to prepare a record and to certify and transmit the same to the Clerk of the United States District Court for the Western District of Washington, Southern Division, within thirty days from the [9] date of the filing of said petition.

Done in open court this 26th day of January, 1916.

M. L. CLIFFORD,
Judge.

Ent. Jour. 151, page 591, Dept. 4, 1916.

Filed in Superior Court. Jan. 26, 1916. E. F. McKenzie, Clerk. By Piper, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[10]**

Reply.

The plaintiff for reply to the affirmative matter set up in the above case, denies each and every allegation therein contained.

HUDSON, HOLT & HARMON,
RALPH WOODS,
Attorneys for Plaintiff.
Rooms 718–19 Tacoma Bldg., Tacoma, Wash.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 28, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[11]**

Defendant's Requested Instructions.

Comes now the defendant at the close of all the testimony and requests the Court to direct the jury to find a verdict in favor of the defendant.

Should the Court refuse to grant the above request, the defendant without waiving the same, asks that the following instructions be given:

I.

I instruct you that the law presumes nothing in favor of the plaintiff or of his allegations in the complaint, and the burden of proof is on him at all times to establish affirmatively by the fair preponderance of the evidence his allegations of negligence against the defendant company. The fact that an accident may have occured to him and that he may have sustained injury while attempting to board defendant's interurban train at Pacific City, on or about the 20th day of March, 1915, raises no presumption of liability against the defendant company. Plaintiff must prove by the fair preponderance of the evidence that while defendant's train was at a standstill at Pacific City, plaintiff attempted to board said train and while in the act of boarding the same it was suddenly started by a jerk which threw plaintiff under the rear wheels of said train, causing the injury complained of, and if you find from the evidence on this point that the evidence for the plaintiff and the evidence for the defendant is evenly balanced in your minds, your verdict must be for the defendant, because the plaintiff has failed in his proof. **[12]**

II.

Before the plaintiff can recover, he must also go further and follow this proof with other proof and must likewise establish by the fair preponderance of the evidence, that the injuries which he claims he suffered are the direct and proximate result of the negligence of the defendant's employees, as set forth in the complaint, and if the evidence on this

point is in your minds, evenly balanced both for the plaintiff and against the plaintiff, your verdict must be for the defendant, because the plaintiff has again failed in his proof.

III.

The defendant charges in its answer that if the plaintiff sustained any injuries at the time and place alleged, that it had no information concerning the same and therefore denies that plaintiff sustained any injuries at the time and place and in the manner alleged, and defendant alleges further that if plaintiff sustained any injuries as complained of, that the same were caused and occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that he heedlessly and recklessly undertook to board said train in an improper manner, while the same was in motion and that at the time said train was put in motion at Pacific City, neither the plaintiff nor any other passenger was on the platform of said station attempting to board the said train, and that if plaintiff attempted to board said train he did so after the same was put in motion and after the doors and vestibule of said train had been closed, and that plaintiff failed to exercise his mental faculties in any way to observe, escape and avoid the risks and dangers of attempting to board a moving [13] train and that he failed to take proper care to provide for his personal safety.

IV.

You are instructed that the plaintiff in this case would not be a passenger within the meaning of

the law unless you should find from the evidence that he was actually attempting to board said car exercising reasonable care and prudence on his part before the conductor gave the signal for the car to start, or that said plaintiff had made known his intentions to board said train by signalling the motorman or conductor, or was standing in such a position as to indicate his intentions to board said train in such manner as reasonably prudent and careful persons ordinarily board interurban trains, under like circumstances, and that the conductors either saw or in the exercise of reasonable care should have seen his intentions so to do, before signalling for said train to start.

V.

You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by passengers in attempting to board moving cars.

VI.

You are instructed that if you believe from the evidence that the train of the defendant was put in motion before plaintiff had attempted to board the same, **[14]** this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind.

VII.

If you find from the evidence that both the plaintiff and the employees of the defendant company were negligent and that this accident resulted from the joint or concurring negligence of the parties, that is, the negligence of both plaintiff and defendant, concurrently contributing to the injury, then your verdict must be for the defendant. The law does not undertake to deal with relative degrees of negligence, and even tho the defendant's employees were guilty of negligence, if you also find that the plaintiff's negligence contributed to the injury, then your verdict must be for the defendant, regardless of the ratio or proportion of negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution the accident would not have occurred, plaintiff cannot recover, and your verdict must be for the defendant. **[15]**

VIII.

You are instructed that misconduct or negligence in the discharge of duty is never presumed, but must be proven. The presumption is that the person charged with a performance of a duty has discharged that duty honestly and faithfully, so in this case, if you find that the train came to a full stop at Pacific City, the law presumes that the train was not started forward by the employees of the defendant company, until the exercise of proper care and caution on their part to ascertain whether or not anyone was

attempting to board said train.

IX.

The burden is upon the plaintiff to show by the fair preponderance of the evidence that the injuries he complains of have resulted from the accident, not merely that they may have so resulted. You are not justified in awarding him for purely speculative injuries, that is to say, for results which may or may not happen, and you will allow the plaintiff nothing for future pain and suffering, unless you are satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result from the injuries.

X.

If you find for the plaintiff in this action, you will confine your verdict to such an amount as will compensate him for actual loss and damage in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if, as I said before, you should find from the evidence in the case that he is entitled to recover anything. **[16]**

XI.

You are the judges of the credibility of the witnesses. It is for you to determine from all the circumstances attending the testimony of any witness how much credibility is to be accorded his statements. If you find from the testimony that the plaintiff himself, or any of the witnesses, made statements at any other time or place at variance with his

statements on the witness-stand regarding any of the material matters testified to by him, it is for you to consider this fact in determining to what extent this fact tends to impeach either his memory or his credibility.

F. D. OAKLEY,
Attorney for Deft.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 29, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [17]

Verdict.

We, the Jury empanelled in the above-entitled cause, find for the plaintiff and assess his damages at the sum of Thirty-five Hundred Dollars ($3,500.00).

A. M. GODDARD,
Foreman.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 7, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [18]

Judgment.

This matter came on regularly for trial on the 5th day of June, 1917, in the above-entitled court before the Hon. Edward E. Cushman, Judge of said court, and a jury, the plaintiff being represented by Chas. L. Westcott and Ralph Woods, and the defendant being represented by F. D. Oakley. After the introduction of the evidence offered and adduced by the

plaintiff and by the defendant, and counsel for the respective parties having argued the matter to the jury, and the Court having instructed the jury on the law, the case being closed, the jury retired to consider its verdict; after consideration thereof the jury found for the plaintiff and assessed his damages in the sum of thirty-five hundred ($3,500) dollars,—

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff, Alexander Matson, do have and recover from the defendant, Puget Sound Electric Railway, a corporation, the sum of Thirty-five Hundred ($3,500) Dollars, together with his costs taxed herein in the sum of One Hundred Eleven and 30/100 Dollars.

Done in open court this 8th day of June, 1917.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [19]

Petition for New Trial.

Comes now the defendant in the above-entitled action and petitions this Honorable Court for an order vacating and setting aside the verdict of the jury and judgment made and entered in the above-entitled action on the 7th day of June, 1917, and granting a new trial for the following causes, materially affecting the substantial rights of the defendant:

I.

Misconduct of the jury.

II.

Excessive damages appearing to have been given under the influence of passion or prejudice.

III.

Insufficiency of the evidence to justify the verdict or other decision, in that the evidence proves conclusively that the plaintiff attempted to board defendant's train after the same had been put in motion and after the only passenger to get off at the station in controversy had alighted and the doors of the vestibule had been closed by the employees of the defendant.

IV.

Irregularity in the proceedings of the plaintiff and his attorney by which the defendant was prevented from having a fair trial, in that the attorney for the plaintiff intimidated one of defendant's witnesses by threatening to have him arrested for perjury if he should testify in the case and in attempting to intimidate witnesses, and made statements before the jury that said defendant's witness had perjured himself at the former trial. [20]

V.

Error in law occurring at the trial as follows:

The Court erred in giving the following instruction to the jury:

> "But the passenger and the plaintiff in this case by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to

board a train, and if he fails to exercise ordinary care for his own safety and because of that failure on his part to exercise ordinary care he is injured, why then he cannot recover, even though the defendant company or its servants are negligent."

The Court erred in refusing to give defendant's requested instruction #5 as follows:

"You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion, he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

The Court erred in refusing to give defendant's requested instruction No. 6 as follows:

"You are instructed that if you believe from the evidence that the train car of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

F. D. OAKLEY,
Attorney for Defendant. [21]

Receipt of a true copy thereof, together with true copies of the exhibits recited therein as being at-

tached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 16 day of July, 1917.

RALPH WOODS,
C. W. L.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [22]

Journal Order Denying Motion for New Trial and Extending Time for Serving and Filing Proposed Bill of Exceptions.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma, on the 23d day of July, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal of said court, to wit:

No. 1980.

ALEXANDER MATSON

vs.

PUGET SOUND ELECTRIC RY.

This cause coming on at this time on a hearing for a motion for new trial, the motion was denied, exception allowed and defendant allowed thirty days to serve and file bill of exceptions. [23]

Bill of Exceptions.

Transcript of Evidence and Proceedings.

BE IT REMEMBERED, that heretofore, and on, to wit, the 5th day of June, 1917, the above-entitled cause came duly and regularly on for hearing before Hon. E. E. Cushman, Judge of the above-entitled court, and a jury:

The plaintiff herein being represented by his attorneys and counsel, Ralph Woods and Charles Wescott;

The defendant herein being represented by its attorney and counsel, Frank Oakley, Esq.;

And thereupon the following proceedings were had and done, to wit:

Testimony of Alexander Matson, Plaintiff, in His Own Behalf.

ALEXANDER MATSON, the plaintiff, being called and sworn in his own behalf, testified as follows:

Direct Examination.

(By Mr. WOODS.)

My name is Alexander Matson. I was born in Finland in 1889 and came to the United States about eleven years ago. I worked for the New York Central on a pile-driver and at many other places. About seven years ago I came to the Pacific Coast. I worked in California, Idaho, Oregon and Washington in logging camps, sawmills, smelters and at other common labor. On March 20th, 1915, I was in Seattle and went from there to Pacific City, ar-

(Testimony of Alexander Matson.)

riving at the interurban station at about nine o'clock P. M. I waited for the interurban train going to Tacoma which came along about eleven o'clock. When [24] the train came in to Pacific City it stopped right at the depot and let one man off the car so I was standing at the lower end of the depot, the end towards Seattle. I did not signal the cars because I did not know they had any signal-post there at the depot at that time, because I had never been at a way station between Tacoma and Seattle before, so I was standing at the lower end of the depot when the train came in and stopped, and one man got off the train, and I started to go up to board the car, and I grabbed the handhold with my right hand, and I was going to step on the car, like a man always used to do, when he gets on a car, so the train started up with a jerk, and she pulled me then, overbalanced me, and throwed me around, and the wheel went sideways across over my foot. They took me to a hospital in Tacoma, and I can just step a little on my foot, I cannot walk on it and still use my crutches. My health prior to this occasion was good. After the train went by I crawled up and tried to stand up on the platform and then crawled inside of the depot and laid down on the bench. I hollered a couple of times for help, and finally two men came with a lantern. I could not say how many minutes the train stopped, but it did not stop very long, just an instant to let a passenger alight. I did not see the conductor at any time. At the time of the accident I was 26

(Testimony of Alexander Matson.)

years old and from that time until March, 1916, was living in Pierce County. I am now living in Seattle.

Cross-examination.

(By Mr. OAKLEY.)

I was standing close to the turnstile about two or three yards from the turnstile, when the train stopped. Before the [25] accident "I went a couple of times through that turnstile." I passed the man who got off the car when he was a little way from the turnstile. I had just taken a few steps and he passed me on the platform. I did not run to catch the car, just took an ordinary walk. The car was stopped when I took hold of it, and I didn't notice the conductor or collector or motorman at all. The vestibule was open. The car stopped about in front of the depot. Mr. Straub came to the hospital to see me a day or two after the accident. Mr. Woods brought up a contract for this case and the first complaint was filed the following Saturday, March 27th.

Defendant's Exhibit "H" is the original complaint filed in the above court March 17th, 1915.

Exhibits "A" and "B" are photographs of the depot at time of accident.

I was never at the station before and didn't attempt to flag the train, I supposed all trains stopped there. I was six feet from turnstile and didn't think the train would stop there and I started up.

A. I stayed right there and waited for the car to stop, to slow down.

Q. And when the man got off, you started ahead?

(Testimony of Alexander Matson.)

A. I started to go up to take that car.

Q. Now, just take a look at Defendant's Exhibit "B." Now, tell me the point on that photograph where you passed this man when you started up to catch the car.

A. Where towards that man?

Q. Yes. A. Just a little way up.

Q. Would it be about the point "X" in that circle? [26]

A. It might have been about that, a few steps. I could not exactly say the distance.

Q. Now, last fall didn't you say this in answer to this question:

> "Q. Now, just look at this exhibit. I want you to mark with a pencil when you passed the man on the platform. A. I think I passed him just here (indicating). Q. Will you mark that 'X' with a circle around it? Now, where you put that 'X' with a circle around it on Defendant's Exhibits 'A' and 'B' is where you passed this man that got off the train, this man that you passed? A. Yes."

Would you say that would be right now, the same as you testified before?

A. Yes, but I cannot say exactly the distance.

Q. As you recall it, that is where you passed this man? A. Yes, sir.

Q. Now, here is another question: "Q. How many feet ahead had you walked when you passed him?" "A. I had not walked, I was just standing up against the end of the platform." Do you remember testify-

(Testimony of Alexander Matson.)

ing that way? I want you to understand it: "How many feet ahead had you walked when you passed him? A. I had not walked, I was just standing up against the end of the platform." Do you remember of answering that that way?

A. Yes, I remember it when I was standing down there, and then I started to walk up to get the car.

Q. You testified this morning that you walked and he walked? A. Yes, sir. [27]

Q. You testified the other time, "I had not walked. I was just standing up against the end of the platform." Wasn't that your testimony before?

A. I do not remember.

Q. "Q. You had not started ahead? A. No, sir. Q. He passed you right where you stood? A. No, sir, I was just starting to go up there. Q. How far did you walk? A. A couple of steps only. Well, I started to go up and he walked past by me. Q. That would be how many yards from the turnstile where you passed? A. It must have been something like three yards from the turnstile." Do you remember that? A. Yes, sir.

Q. That is about right, is it not?

A. Yes, I think that is about right.

I saw a man when he came from the car, he could not have come from any place else. I was down on the platform and it was dark there and I can't say exactly what step it was he got off of. I cannot say how he stepped off, but he got off the car. I passed him back near the turnstile. When I got hold of the car with my right hand it started up with a jerk and

(Testimony of Alexander Matson.)

pulled me ahead and overbalanced me. I picked myself up from off the platform and crawled right up on the end of the platform. I had been lying right on the ground there. My head was lying towards Tacoma. When I boarded the car the door of the car was right opposite the door of the depot. The wheels on the last truck ran over me. The company paid all doctor, hospital and medical bills.

On the day of the accident I left Seattle and went to [28] Kent, and walked from Kent to Auburn. I was in Auburn the best part of the day, leaving there between four and five o'clock in the afternoon, and then walked on the Milwaukee tracks to Pacific City, a distance of three or four miles, and got at Pacific City about nine o'clock. When I got there I made up my mind to go to Tacoma, and had money to pay my fare to Tacoma.

Testimony of J. W. Shull, for Plaintiff.

J. W. SHULL, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

In March, 1915, I lived at Pacific City. About twenty minutes to twelve I went to the depot at Pacific City after returning from Auburn. Saw a man with a smashed foot in the depot. He was lying on the bench on the southwest corner. One spot of blood was in the depot right opposite his foot. There was a spot on the platform right beside the steps that

(Testimony of J. W. Shull.)

go into the freight house. These steps are shown on Defendant's Exhibit "A and B."

Cross-examination.

(By Mr. OAKLEY.)

Lights were burning on the depot and I had no difficulty in seeing the platform as there was light there. I had a confectionery store about sixty or sixty-five feet from the turnstile, that night in charge of my father and the lights were burning in front of my store when I got there. These lights consist of two Mazda globes in a cluster and three inside the store and burn all the time. I could see all the [29] way from the store to the turnstile.

Recross-examination.

(By Mr. OAKLEY.)

I saw Roy Bungardner that night in Auburn. He was going to catch the Interurban, a cluster of lights have been put near the depot on a pole since the accident.

Testimony of William Maurer, for Plaintiff.

WILLIAM MAURER, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I was the conductor in charge of the Puget Sound Railway on March 20th, 1915. We left Seattle at 10:05 o'clock. We might have been a couple of minutes or so late. We got to Pacific City somewhere around six or seven minutes after eleven.

Testimony of Onnie Weaver, for Plaintiff.

ONNIE WEAVER, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I am seventeen years old. On March 20th, 1915, I was in Tacoma on the last car leaving for Seattle. It was a rather dark night.

VIEW OF PREMISES.

The jury visited the scene of the accident and viewed the premises at Pacific City, pursuant to the direction and order of the Court. [30]

Testimony of Henry Martin, for Defendant.

HENRY MARTIN, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at Renton and have been employed for the defendant company as motorman for seven years and was motorman in charge of the train in controversy. We left Seattle at 10:05 and arrived at Pacific City about 11:00 o'clock. The number of the motor was 516. The train consisted of two cars. One in charge of conductor Maurer and the other in charge of Mr. McClintock. While pulling into Pacific City I got a signal to stop there and made just a short stop of twenty-five or thirty seconds and then got a signal to go ahead and started it up. The headlights were burning and also the lights at the station. I did not

(Testimony of Henry Martin.)

see anyone on the platform or about there at the time. The cars are each about fifty-five feet long and the front end of the motor was stopped fifteen or twenty feet south of the south end of the platform and south of the fence. I started the car just as usual, one point on the controller right after the other. It is impossible to start the motor in such a manner as to throw a man a distance of six or eight feet while attempting to board the car. If the car is started suddenly the power is thrown off by the automatic circuit breaker. I did not see any passengers get off the car at the station. I was on the opposite side of the car from the platform.

Cross-examination.

(By Mr. WOODS.)

I did not hear of the accident until the next day. That [31] night I went back to Seattle on the local train and do not remember whether I stopped at all the stations or not on the return trip. I did not see anyone on the platform. My attention was called to the accident the next afternoon. I know that I did not start until I got a signal, but do not know where the conductor was when the signal was given. We were about five minutes late at Pacific City. When the train pulls into the station the lights are not dim because we are drifting for some distance before we start to stop. When we start the lights are dim.

Testimony of H. E. McClintock, for Defendant.

H. E. McCLINTOCK, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in Sacramento, California, and am employed as conductor on the Northern Electric Railway. At the time of the accident in controversy I was the conductor on the head car. We left Seattle at 10:05. After leaving Algona conductor Maurer on the rear car gave a signal with the bell cord to the motorman to stop at Pacific City. We stopped; one passenger alighted from the rear car, after which I looked out and saw there was nobody to board the train and I stepped over on the other side of the vestibule, pulled the bell cord for the motorman to go ahead and we started. I stepped back into the vestibule and looked out again. After leaving Pacific City the vestibule doors were closed on each car. I raised up the trap and opened the outside door. I was in the vestibule when the car stopped at Pacific City and only one passenger got off and nobody [32] got on, and nobody was waiting on the platform to board the train. The car started in the ordinary manner without any jar or jolt at all. Algona is about two miles from Pacific City and Auburn about three miles from Pacific City. Defendant's Exhibit "D" is a photograph of the rear end of motor car Number 516 in my charge at that time. I didn't hear anything of the accident until the following day.

(Testimony of H. E. McClintock.)

Cross-examination.

(By Mr. WOODS.)

We were about two or three minutes late at Pacific City; neither of the conductors got off the train because it was not necessary. My attention was not called to this accident until the following afternoon.

Redirect Examination.

(By Mr. OAKLEY.)

One of our motormen, W. B. Crouch, lives at Pacific City and had an early run out of Tacoma in the morning and he came in on one of the evening trains to take his run out in the morning. I had been working on this run for several months.

Testimony of William Maurer, for Defendant.

WILLIAM MAURER, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in Seattle. Have been working as conductor for the defendant company about twelve years and was in charge of the rear car of the train in controversy. A passenger got on at Auburn. Trains stop at Pacific City only on signal. We stop only when we have passengers to let off or pick up. When we approached Pacific City the passenger got up and [33] came to the front door and opened it just as the train came in and stopped. I opened the trap which covers the steps on the inside flush with the platform and then I stepped to one side to let him off. The door cannot be opened without the trap

(Testimony of William Maurer.)

down. The passenger was standing on the platform ready to get off and nobody was on the station platform to board the train. The lights of our car and the lights on the station light up the platform so you could see anyone there. I did not see anyone walking from the rear of the car as if they were going to approach it and there was nobody signalling or attempting to board the car when the signal was given to go ahead. As soon as the passenger got off I looked to see if there was anyone to get on and there was no one there, and I gave the signal to McClintock with my hand to go ahead and he pulled the bell. Just as he pulled the bell I closed the door. The car did not start with any violent or unusual jerk. I did not hear of this accident until 10:00 the next day when the agent called me up.

Cross-examination.

(By Mr. WOODS.)

I was not back in the middle of the car when the car started. I did not get off the car that night. We are always two or three minutes late and we might have been two or three minutes late this time. I can tell exactly where I stood when we were at Pacific City. A signal board is provided at the station for passengers wanting to board the car. If we do not get a signal we think they are only standing there.

Redirect Examination.

(By Mr. OAKLEY.)

It is the duty of both conductors to watch signals of [34] passengers given for boarding the train.

(Testimony of William Maurer.)

At night this signal was a white light and in day times the arm moves out. The motorman's duty is to watch that signal.

Recross-examination.

(By Mr. WOODS.)

The motorman does not start without orders. The conductors give the signal to start.

Testimony of F. G. Woodward, for Defendant.

F. G. WOODWARD, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am draftsman for the defendant company and I prepared a map, Defendant's Exhibit "E," showing location of the tracks, station, etc., at Pacific City and drawn to a scale of one inch to five feet.

Cross-examination.

(By Mr. WOODS.)

This map was drawn by me November 27th, 1915. I do not know what changes have been made in the platform or turnstile.

Testimony of John A. Jackson, for Defendant.

JOHN A. JACKSON, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am assistant claim agent for the defendant company, and took Defendant's Exhibits "A," "B,"

(Testimony of John A. Jackson.)

"F" and "G" three days after the accident. They show the condition of the platform, depot and turnstile at the time of the accident. I do not [35] know of any changes except the replanking, putting in new timbers having been made there since.

Testimony of E. M. Newcomb, for Defendant.

E. M. NEWCOMB, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live at Sunnyside, Washington. At the time of this accident was residing in Pacific City, in the building marked on the exhibit "C. D. Hillman." My family and father-in-law O. H. Fuller were living with me. Mr. Fuller has since died. After the train left the station sometime I heard someone hollering. After repeated calls I got up and finally went over to the depot and found the plaintiff in the station on the south of the door lying on the bench head pointing east. That is, away from the track. He told me he had got a foot smashed. He was drunk. The first thing I got was a big whisky breath right in my face. I then went back to the house, and took Mr. Fuller with me, then I walked to Algona for Doctor Southward, and brought the doctor back with me. The doctor opened up his medicine case, handed the man a half pint of whisky and he drank nearly all of it. The doctor gave him an injection of some kind to deaden the pain, bound up his foot. We then put him in the baggage-room

(Testimony of E. M. Newcomb.)

of a car coming from Seattle. When I first went across the street three sixty-candle power lights were in front of the poolroom and lit up the whole street and lights in the depot [36] were all in good condition. Light enough so you could see, the inside of the depot was also light so that I could see him in there.

Cross-examination.

(By Mr. WOODS.)

The company paid my expenses for coming here as a witness. While living in Pacific City I worked on the Inter-County River Improvement for six months.

Redirect Examination.

(By Mr. OAKLEY.)

At present I am in the sheep business east of the mountains. I had my right hand cut off in a manufacturing plant in Seattle ten years ago.

Testimony of Roy Baumgardner, for Defendant.

ROY BAUMGARDNER, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I live in Namba, Idaho, with my father and mother working on their ranch. Have been there about three years. At the time of the accident I was living at Pacific City. On the night of the accident in controversy I got on the train at Auburn about 11:00, after having some dental work done. I was

(Testimony of Roy Baumgardner.)

in the front part of the rear car and recognize the conductor here in Court as the conductor in charge of the car I was in. As we were coming in to Pacific City the conductor opened the trap door in the vestibule and the door was then pulled in and I stepped off. I was standing right behind the conductor [37] as close as I could get without being in the road. When I stepped off the car there was nobody on the platform at any place or near the depot, and no one indicated any intention of boarding the car. I then went out of the turnstile going north and there was nobody on the platform while I was walking along it. When I got out of the turnstile I noticed a man across the track running towards the turnstile. He passed me about four feet from me. He was running towards the depot. The Interurban train was moving when I got to the turnstile. I looked back once and noticed a man who was inside the turnstile, and just as I looked back it looked to me like he was attempting to board the car. I was not sure because I did not pay so much attention. The lights were burning good and the road was lit up and I would have no difficulty in seeing a person on the platform but there was no one there. I first heard that the man was injured the next evening.

Cross-examination.

(By Mr. WOODS.)

I saw a man outside of the turnstile but did not recognize that man as Mr. Matson. If Matson passed me on the platform I did not see him.

Testimony of M. M. Shull, for Defendant.

M. M. SHULL, being called and sworn as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I live on a fruit ranch in Yakima County. At the time of the accident I lived in Pacific City. About 11:00 that night I was standing in front of my son's store which I was [38] tending for him. This store is about sixty-five feet from the depot. I closed the store about 11:00 or a few minutes after, and saw the Interurban come in from Seattle to Tacoma. There were two lights on the outside of the store next to the street. They burn all night and throw a very good light directly across the road. I had just come out of the door when the train was standing there. I could see the track, and when I first saw Roy Baumgardner he was about the North side of the street just crossing the road. I saw another man just a moment before. He was running in the road towards the depot right about the middle of the street and the train was standing there then. I did not see the train start up and didn't pay any further attention to this man. I saw this man about ten or fifteen seconds before I saw Roy. I did not see him go through the turnstile or as far as the turnstile. I saw this man the following Monday at the Tacoma General Hospital. That is, I saw a man, Dr. Wing, at the hospital, who told me this was the same man I saw running.

(Testimony of M. M. Shull.)

Cross-examination.

(By Mr. WOODS.)

I did not see Matson run around the back of the car. I saw Baumgardner just after I saw this man running. I was standing right in front of the store on the porch. There is some lights on the poles shown at the point "J" on Defendant's Exhibit "E," those lights were put in later. There were lights on the depot. This man when I saw him was about the middle of the street shown on the map, going towards the platform. Baumgardner was on the North side of the street. I think he went straight across the street from the turnstile. I did not see Baumgardner and this man pass, I saw the man running first; then in probably fifteen seconds I saw Baumgardner. I saw [39] Baumgardner at the point I marked with the letter "P" on the map, and "P-prime" at the place where the man was running. I could see the man because there are two strong electric lights on the building and lights on the depot.

Redirect Examination.

(By Mr. OAKLEY.)

Q. When you fixed this point "P," P-prime, on the map, what did you mean by that? Did you mean them to be the exact location or just approximately? A. I did not mean it to be exact.

Q. It may be two or three feet off or more than that? A. It might be.

Q. Now, you have no interest in this trial?

A. No, sir, I have not.

(Testimony of M. M. Shull.)

Q. Now, did you have a conversation this morning with Mr. Woods in reference to what would happen to you if you testified this morning?

A. Mr. Woods spoke to me in the hall out there this morning.

Q. What did he say with reference to your appearing here as a witness?

A. He said if I lied like I did the other time he would send me to the penitentiary.

Q. When did he tell you that?

A. About an hour ago.

Q. Was Roy Baumgardner there when he told you that?

A. He might have been in the hall, I did not notice.

Q. He told you if you lied like you did the other time he would have you arrested for perjury, didn't he?

A. Yes, and have me sent to the penitentiary.

(Witness excused.) [40]

The COURT.—(Addressing Mr. Woods.) If he lied the other time, why have you not had him arrested before this time?

Mr. WOODS.—Your Honor will remember that in the other trial—(interrupted).

Mr. OAKLEY.—I do not think it is necessary to have any explanation.

The COURT.—If you made that remark in good faith—(interrupted).

Mr. WOODS.—I made that remark in good faith.

The COURT.—Why didn't you have him arrested when this trial came off? Why were you holding it

(Testimony of M. M. Shull.)

over him when he was a witness in this case?

Mr. WOODS.—The testimony is practically the same now as it was before, that he stood there fifty or seventy-five feet away—he testified that he recognized the witness—I understood the witness to testify in the other trial that he recognized this man—(interrupted).

The COURT.—I did not ask you to rehash this testimony, but if you thought he had perjured himself and if you were able to prove it, it would seem to be your duty to start that prosecution and not try to influence his testimony in this trial by talking to him about it.

Mr. WOODS.—Well, all I want is the truth, and I cannot see where he is telling the truth.

Mr. OAKLEY.—It is an attempt to intimidate a witness.

DEFENDANT RESTS. [41]

Testimony of A. E. Southward, for Plaintiff.

A. E. SOUTHWARD, being called and sworn as a witness on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

At the time of this accident I lived at Algona and attended the plaintiff when he was injured at Pacific City that night. He was not drunk at the time I saw him and I did not smell any liquor on his breath. I gave him some whiskey at the time.

Testimony of Onnie Weaver, for Plaintiff.

ONNIE WEAVER, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I am acquainted with Mr. Newcomb and have known him two or three years. His general reputation for truth and veracity is not a very good reputation.

Cross-examination.

(By Mr. OAKLEY.)

I am seventeen years old.

Testimony of W. F. Wells, for Plaintiff.

W. F. WELLS, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I live in Pacific City and am acquainted with Mr. Newcomb. His general reputation for truth and veracity is pretty bad. [42]

Testimony of John Erickson, for Plaintiff.

JOHN ERICKSON, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I have lived in Pacific City and have known Ernest

(Testimony of John Erickson.)

Newcomb for about three years. His general reputation for truth and veracity is not very good.

Testimony of W. S. Shull, for Plaintiff.

W. S. SHULL, being called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I have known Ernest Newcomb while I lived in Pacific City. I do not know his reputation only just rumors I have heard.

Testimony of Alexander Matson, Plaintiff in His Own Behalf.

ALEXANDER MATSON, the plaintiff, being recalled and sworn in his own behalf, testified as follows:

Direct Examination.

(By Mr. WOODS.)

I was not drunk on the night I was injured and had not been drinking at all on the night of the accident. I was not across the track behind the train on the other side from the depot.

The following occurred during argument of counsel to the jury:

Mr. WOODS.—In these days and age, there are too many [43] silk-stockinged men looking for soft jobs, and he is a laboring man—(interrupted).

Mr. OAKLEY.—I object to that.

The COURT.—Objection sustained.

Mr. WOODS.—If I have not been the suave actor

(Testimony of Alexander Matson.)
that the attorney for the defendant is, do not take it out of my client. I am a common ordinary lawyer, and I do the best I can, and I am not here defending damage suits for corporations.

Mr. OAKLEY.—I object to that.

The COURT.—Objection sustained.

* * * * * * * * * * *

Mr. WOODS.—It seems as though, in every case, at the beginning of every panel, there is generally one or two jurors that start out pig-headed, and are that way all through the panel.

Mr. OAKLEY.—We object to that.

The COURT.—Objection sustained.

Testimony of F. D. Oakley, for Plaintiff.

(By Mr. WOODS.)

Cause #1779 has been dismist. [44]

Instructions Requested by Defendant.

The defendant requested the Court in writing to charge the jury, among other things, as follows:

You are instructed to bring in a verdict in favor of the defendant.

"You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

"You are instructed that if you believe from the evidence that the train car of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

The Court refused to give defendant's requested instruction for the jury to bring in a verdict in favor of the defendant whereupon the case was argued to the jury by counsel for the respective parties to the action. [45]

Instructions of Court to Jury.

At the close of the argument of counsel, the Court instructed the jury as follows:

The COURT.—Gentlemen of the jury, before you retire to consider what your verdict will be in this case, it is the Court's duty to instruct you concerning the law. You will take out with you to your jury-room the pleadings in this case. These pleadings consist of the amended complaint of the plaintiff, the answer of the defendant, and the reply to the answer which the plaintiff has interposed. Briefly, as has been explained to you already, the amended complaint which the plaintiff has filed, charges that the train of the defendant stopped at Pacific City, and that while it was standing still the plaintiff started to board the car, to get on board, but that while he was in the act of getting on the car it was started negligently by the defendant company, through its servants, and that because of the violent jerk of the car in starting, the plaintiff was

thrown so that his leg or foot was run over, and he was injured. The defendant company in its answer denies any knowledge of how the plaintiff came to be injured. It denies that he was injured through any negligence upon its part, and alleges that if he was injured at that time and place that he was injured solely because of his own negligence in the manner in which he was attempting to board a moving train. The plaintiff then in his reply denies that there was any negligence on his part, and those are the issues that you are called upon to determine. [46]

II.

As has been stated to you in the arguments, there is a difference in the degree of care which the defendant, the railroad company, owes to a passenger, and the degree of care which the passenger owes to himself. A common carrier of passengers is bound to the highest degree of care consistent with the practical operation of its road and trains, but before you can apply that rule, and hold the defendant to that high degree of care, it would be necessary to find, by a fair preponderance of the evidence, that the plaintiff had become a passenger. It is not every man who is running along the street to catch a train who is a passenger. Before he can be considered a passenger, he must have either gotten upon the train or be in such a position, either mounting the train, or having shown by his conduct that he desires to board the train, has to either be seen by the agents of the common carrier operating a train, and they have to realize that he desires to take the

train, or, at least, be in such a position and have so indicated his intentions that they should realize it if they were exercising due diligence in keeping a lookout to see who was going to board the train at their regular stop. But the passenger, and the plaintiff in this case, by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety, and because of that failure on his part to exercise ordinary care, he is injured, why, then, he cannot recover, even though the defendant company or its servants are negligent. [47]

III.

Ordinary care means the care that an ordinarily careful and prudent person would exercise under like circumstances, and should always be proportioned to the peril and danger reasonably to be apprehended from a want of proper prudence.

IV.

Now, I believe I told you, but I will repeat it for fear my memory may be at fault, before the plaintiff can recover in this case he must have established by a fair preponderance of the evidence that the defendant company was negligent in the particular matter of which he complains in his amended complaint, which you will take out with you, and he must go further than that and show also by a fair preponderance of the evidence that this negligence, of which he complains, was the proximate cause of his injury. If the preponderance of the evidence on either of these points is with the

defendant company, or if it is evenly balanced on either of these points, so that you cannot say on which side it preponderates, why, your verdict would be for the defendant company.

V.

So far as the allegation in defendant's answer is concerned, that the plaintiff himself was to blame for this injury, that is, that he himself was negligent and failed to exercise ordinary care for his own safety, and that that was the cause of his injury, so far as that allegation is concerned, the burden of establishing that by a fair preponderance of the evidence is with the defendant, unless the plaintiff's own evidence has shown that he himself was guilty of contributory [48] negligence.

VI.

This expression that I have used in these instructions, "preponderance of the evidence," means the greater weight of the evidence. That evidence preponderates which is of such a character and so appeals to your reason and your experience as to create and induce belief in your minds, and if there is a dispute in the evidence, that evidence preponderates which so strongly appeals to your reason and experience as to create or induce belief in your mind, in spite of any evidence that may have been brought to oppose it.

VII.

I have used in these instructions, also, the expression, "proximate cause." The law says that every person is responsible for the natural and direct consequences of his voluntary acts, and is not

responsible for the results that do not flow naturally and directly from his voluntary acts.

VIII.

I will read to you certain instructions that I have been requested to give, and in so far as they may be a repetition of what I have already told you, you are not for that reason to allow yourselves to conclude that I deem them more important than those I do not repeat. They are simply repeated because I am endeavoring to be sure to cover all of the law of the case.

IX.

"The Court instructs the jury that when an electric interurban train stops at a station to discharge and receive passengers, while it is so stopped it invites persons at the station to enter the car and become passengers, and until that [49] invitation is recalled, any person actually beginning to enter it, is a passenger.

The Court further instructs the jury, if they believe from the evidence that the plaintiff was at the station for the purpose of embarking thereon as a passenger; and that the said interurban train stopped at the station and that the same was a usual and ordinary stopping place of said interurban, and that said interurban car was stopped by a servant or servants of the defendant company, and that the plaintiff, while it was so stopped, endeavored to get upon that said car, then the plaintiff, while so in the act of getting on said car was a passenger; and if the jury further believe from the evidence that the plaintiff was injured by the negligent

starting of the car while he was in the act of getting thereon in the exercise of such care as might reasonably be expected from a man of his age under the circumstances, then as to the issue of defendant's negligence, they should find for the plaintiff."

X.

"The Court instructs the jury that an interurban company, as a common carrier of passengers, is bound to run and operate its cars with the highest degree of care for its passengers, in view of all the facts and circumstances connected with each particular case."

XI.

"The jury is further instructed that a carrier of passengers stopping its train to take on or discharge passengers is bound to hold the same a reasonable length of time to allow an intending passenger to board with safety, providing those of the defendant's servants in charge of the car know, or should in the exercise of due care, know of such intention, and **[50]** in the absence of contributory negligence by a passenger, is liable for injury resulting from failure so to do."

XII.

"I instruct you that the law presumes nothing in favor of the plaintiff or of his allegations in the complaint, and the burden of proof is on him at all times to establish affirmatively by the fair preponderance of the evidence his allegations of negligence against the defendant company. The fact that an accident may have occurred to him and that he may have sustained injury while attempting to

board defendant's interurban train at Pacific City, on or about the 20th day of March, 1915, raises no presumption of liability against the defendant company. Plaintiff must prove by the fair preponderance of the evidence that while defendant's train was at a standstill at Pacific City, plaintiff attempted to board said train and while in the act of boarding the same, it was suddenly started by a jerk which threw plaintiff under the wheels of said train, causing the injury complained of, and if you find from the evidence on this point that the evidence for the plaintiff and the evidence for the defendant is evenly balanced in your minds, your verdict must be for the defendant, because the plaintiff has failed in his proof."

XIII.

"Before the plaintiff can recover, he must also go further and follow this proof with other proof and must likewise establish by the fair preponderance of the evidence, that the injuries which he claims he suffered, are the direct and proximate result of the negligence of the defendant's employees, as set forth in the complaint, and if the evidence on this point is in your minds, evenly balanced both for the [51] plaintiff and against the plaintiff, your verdict must be for the defendant, because the plaintiff has again failed in his proof."

XIV.

"The defendant charges in its answer that if the plaintiff sustained any injuries at the time and place alleged, that it had no information concerning the same and therefore denies that plaintiff sus-

tained any injuries at the time and place and in the manner alleged, and defendant alleges further that if plaintiff sustained any injuries as complained of, that the same were caused and occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that he heedlessly and recklessly undertook to board said train in an improper manner, while the same was in motion and that at the time said train was put in motion at Pacific City, neither the plaintiff nor any other passenger was on the platform of said station, attempting to board the said train, and that if plaintiff attempted to board said train he did so after the same was put in motion and after the doors and vestibule of said train had been closed, and that plaintiff failed to exercise his mental faculties in any way to observe, escape and avoid the risks and dangers of attempting to board a moving train and that he failed to take proper care to provide for his personal safety."

XV.

"You are instructed that the plaintiff in this case would not be a passenger within the meaning of the law unless you should find from the evidence that he was actually attempting to board said car exercising reasonable care and [52] prudence on his part before the conductor gave the signal for the car to start, or that said plaintiff had made known his intentions to board said train by signalling the motorman or conductor, or was in such a position as to indicate his intentions to board said train, under the circumstances, and that the conductors

either saw or in the exercise of due care should have realized his intentions so to do, before signaling for said train to start."

XVI.

"If you find from the evidence that both the plaintiff and the employees of the defendant company were negligent and that this accident resulted from the joint or concurring negligence of the parties, that is, the negligence of both plaintiff and defendant, concurrently contributing to the injury, then your verdict must be for the defendant. The law does not undertake to deal with relative degrees of negligence, and even though the defendant's employees were guilty of negligence, if you also find that the plaintiff's negligence contributed to the injury, then your verdict must be for the defendant, regardless of the ratio or proportion of negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution, the accident would not have occurred, plaintiff cannot recover and your verdict must be for the defendant."

XVII.

"You are instructed that misconduct or negligence in the discharge of duty is never presumed but must be proven. The presumption is that the person charged with a performance [53] of a duty has discharged that duty honestly and faithfully, so in this case, if you find that the train came to a full stop at Pacific City, the law presumes that the train

was not started forward by the employees of the defendant company, until the exercise of proper care and caution on their part to ascertain whether or not any one was attempting to board said train; this presumption would continue until overcome by proof to the contrary."

XVIII.

"The burden is upon the plaintiff to show by the fair preponderance of the evidence that the injuries he complains of have resulted from the accident, not merely that they may have so resulted. You are not justified in awarding him for purely speculative injuries, that is to say, for results which may or may not happen, and you will allow the plaintiff nothing for future pain and suffering, unless you are satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result from the injuries."

XIX.

"If under the foregoing instructions you find for the plaintiff, you will assess his damages at such sum, not to exceed ten thousand dollars, as you may believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for the injury he has sustained, and to determine its amount you may consider plaintiff's age, his previous condition of health, his earning capacity, his expectancy of life, the permanency of the injury, the pain and suffering he has endured, and that which it is shown with reasonable certainty, he will suffer in the future." [54]

XX.

"If you find for the plaintiff in this action, you will confine your verdict to such an amount as will compensate him for actual loss and damage in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if as I said before, you should find from the evidence in the case that he is entitled to recover anything."

XXI.

In taking up these questions after you retire to your jury-room, naturally and reasonably, the manner in which to approach the case is to first consider the question of whether there is a fair preponderance of evidence showing that *that* the plaintiff himself contributed to his injury by his own want of ordinary care. If you find on that issue that he was guilty of such contributory negligence and because his own negligence contributed to his injury, you would stop there at that point and return a verdict for the defendant, because, as I told you at least twice before, the plaintiff cannot recover if he was himself at fault in this respect; but if you fail to find that there is a fair preponderance of evidence showing that he himself was guilty of contributory negligence, as I have defined it to you, you would then pass to the next step and determine whether the defendant was negligent in the particular of which plaintiff complains, and whether that was shown by a fair preponderance of the evidence. If you failed

to find that there was a fair preponderance of the evidence showing such negligence, you would return a verdict for the defendant; but if you do find that there is a fair preponderance of the evidence showing such [55] negligence, and that there is a fair preponderance of the evidence showing that that negligence on its part was the cause of plaintiff's injury, then you would pass to the final step in the case and determine the amount that should be allowed plaintiff on account of his injury.

XXII.

The argument which plaintiff's counsel made regarding his earning capacity, taking three dollars a day as a basis of computation, is liable to be misleading in this respect: He states that his client was twenty-six years old, that he would live until three score years and ten, that it might be presumed that he would live that long. Well, it only takes a moment's reflection to determine that cash in hand, money paid now, would be much more valuable to him, than if he would get it on his seventieth birthday, because that would be a long time in the future, and one dollar at the end of forty years or more, there would be a considerable discount on it if you wanted to get its present worth, that is, if you take $10,000 now at seven per cent interest, that would earn $700 per year, which he figured out, I believe, would be the earning capacity of his client. Upon that principle he would have the $700 a year and still have the $10,000 left at the end of that period, so if you do come to that point in the case, take those things into consideration in finding the present value

of his services and the extent to which they have been impaired. **[56]**

XXIII.

You are the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility of the witnesses. In weighing the evidence, and in passing upon and determining the amount of credit that should be accorded the different witnesses who have come before you and testified, you should take into account the manner in which they have given their testimony, their appearance upon the stand, whether they appeared to you to be candid and fair, and whether the opposite, whether they impressed you as trying to tell exactly what they knew, neither adding to it nor taking from it, or whether they appeared to you to be reluctant, evasive, holding back something until they were forced by repeated questions, or whether they may not have impressed you as being too willing, running along, volunteering information which nobody had asked for.

XXIV.

Also you will take into consideration the testimony of each witness by itself, whether it appears to be reasonable and probable in the light of all of the circumstances, whether it is corroborated by other testimony where you would expect it to be corroborated, if it were true, or whether it is contradicted by other evidence in the case; also you should take into account whether any witness has made any contradictory statements at other times that is, statements contradicting or at variance with those

that he makes now upon the witness-stand. You will take into account the situation in which each witness was placed as enabling that witness to tell you exactly what took place, if he wanted to, because one witness might be much better situated to tell you exactly what happened [57] than another who was just as honest. Also you will take into account the interest that any witness may have in the case, as shown either by the manner in which he gave his testimony or by his relation to the case. The plaintiff, having taken the stand in his own behalf, you will apply to his testimony the same rules you apply to the testimony of other witnesses, including his natural interest in the result of your verdict.

XXV.

You are not bound to find in accordance with the greater number of witnesses, but the number of witnesses is something you should take into account in arriving at the truth, because a number of witnesses are not so likely to be mistaken as one witness, that is, if the number all testify along the same lines.

XXVI.

If you find that any witness has wilfully testified falsely with regard to any material matter, you may disregard his testimony entirely, except in so far as it may be corroborated by other credible testimony.

The COURT.—Anything further, gentlemen?

Mr. WOODS.—Your Honor stated there that $10,000 at seven per cent would make $700, but there was nothing said whatever about pain and suffering.

The COURT.—I am simply trying to show them

that that argument was misleading, to take his earning capacity and give him now all of the money that he would ever earn, or anything like that. That was what I was trying to point out, that that would be misleading. Of course, I did not mean to prevent their taking into account future pain and suffering which he might endure. **[58]**

Mr. OAKLEY.—Defendant excepts to an instruction given by the Court relative to the degree of care that a common carrier owed, and then the Court proceeded as follows: "But the passenger and the plaintiff in this case is bound to exercise ordinary care," and then proceeded along the line of ordinary care in boarding the car. Defendant excepts to the instruction for the reason that the plaintiff in this case was not a passenger, but, according to evidence here on behalf of the defendant, was merely running to get the car, and if the car had been started and put in motion, or if the plaintiff was not an intending passenger, then the company owed no care whatever to the plaintiff. He was a trespasser.

The COURT.—Well, I can see where the jury might misunderstand the first part of the instruction. I will endeavor to straighten that out. The last part of your exception, I will not comment upon.

Gentlemen of the Jury: The Court did not mean in any way to intimate that the plaintiff was a passenger, but, whether he was a passenger or not, he was bound to exercise ordinary care for his own safety. That was what the first part of my instruction was meant to mean.

Mr. OAKLEY.—I wish to take exception to that instruction because it does not state the rule applicable to the facts of this case, and does not correctly state the law.

The COURT.—Exception allowed, although in a general exception [59] of that kind, I do not believe you would gain any advantage.

Mr. OAKLEY.—I do not believe I would, either, but I tried to make it more definite in the latter part of the other exception.

The defendant wishes to except for the reason that if the plaintiff was not a passenger, as we say he was not a passenger, and was running to board the car, he was a trespasser, and no exercise of ordinary care on his part would justify him in attempting to board the car.

The COURT.—Gentlemen of the jury, if the train was moving and the vestibule was closed, and there was no invitation on the part of the defendant company to encourage the plaintiff in any way to board the car, and he flew at the side of the car, the defendant company did not owe him any exercise of ordinary degree of care. All it did owe him was for itself and its servants to refrain from wilfully and purposely injuring the plaintiff.

Mr. OAKLEY.—Defendant also excepts to the refusal of the Court to give defendant's requested instruction No. 5, which is as follows:

"You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion he cannot recover damages from

the defendant, because he assumed the risk of being injured while attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

Mr. OAKLEY.—Defendant also excepts to the refusal of the Court to give defendant's requested instruction No. 6, which is [60] as follows:

"You are instructed that if you believe from the evidence that the train car of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

The COURT.—Exceptions allowed.

The COURT.—Gentlemen of the jury, the Court submits two forms of verdict, one finding for the plaintiff, and one finding for the defendant. The one finding for the defendant, all it requires is that it be filled out by the signature of your foreman, but the one finding in favor of the plaintiff has a blank space in it, in which it would be necessary to insert the amount of damages you may award him, and also you should have that signed by your foreman, if you find for the plaintiff, and notify the bailiff when you have agreed and return with your verdict into court.

(Jury retires.) [61]

Verdict.

Thereafter the jury returned into open court with a verdict in favor of the plaintiff for damages

against the defendant in the sum of $3,500.

Thereafter and in due time defendant served and filed a Petition for a new trial, alleging as grounds therefor, among other grounds, the following:

Irregularity in the proceedings of the plaintiff and his attorney by which the defendant was prevented from having a fair trial, in that the attorney for the plaintiff intimidated one of defendant's witnesses by threatening to have him arrested for perjury if he should testify in the case, and in attempting to intimidate witnesses, and made statements before the jury that said defendant's witness had perjured himself at the former trial.

And thereafter and on the 23d day of July, 1917, said Petition for a new trial was duly presented to the Court, including the above ground, and said Petition was on said date denied and exceptions allowed this defendant.

Now, in the furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed, and certified by the Judge, as provided by law, and filed as a Bill of Exceptions.

F. D. OAKLEY,
Attorney for Defendant.

Received copy of within Bill of Exceptions this 20th day of August, 1917.

RALPH WOODS,
C. L. W. [62]

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 20, 1917.

Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Refiled in the U. S. District Court, Western Dist. of Washington, Southern Division. As Settled by the Court. Dec. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [63]

Order Settling Bill of Exceptions.

Now, on this 8th day of December, 1917, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause, defendant appearing by F. D. Oakley, its attorney, and the plaintiff appearing by Ralph Woods and Charles Westcott, attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly filed and served on the attorneys for the plaintiff, within the time provided by law, and the order of this Court, and that certain amendments have been suggested thereto and the Court having ordered certain amendments to be made and it appearing to the Court that there has been filed with the clerk of said court a bill of exceptions which contains the amendments as ordered by the Court, and that the same is in all other respects a duplicate of the proposed bill of exceptions, filed by the defendant herein in this cause, and it appearing that the time for settling said bill of exceptions has not expired; and it further appearing to the Court that the said bill of exceptions as amended contained all the material facts occurring in the trial of said cause, together with the exceptions thereto and all [64]

the material things and matters occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions, and the clerk of this court is hereby ordered and instructed to attach the same thereto;

THEREFORE, upon motion of F. D. Oakley, attorney for the defendant, is is hereby

ORDERED, that said bill of exceptions as amended, filed on the 20th day of August, 1917, be and the same is hereby settled as a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said cause, as a true, full, and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Plaintiff excepts because bill of exceptions was not served and filed within the time allowed by law and the rules of the Court; and objects to the signing of any bill of exceptions, and exception is hereby allowed.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [65]

General Order Continuing All Court Matters Over Term.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma, on the 2d day of July, 1917, the Honorable Edward E. Cushman, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

It is now ordered that Court stand adjourned *sine die,* and that all causes, motions, demurrers and other matters, now pending in this court at Tacoma, Washington, and not now disposed of are continued until the next regular term of said court, and that the petit jury now in attendance upon this court be kept in attendance thereon for the purpose of disposing of the jury cases now set for trial in the July term thereof. [66]

Assignments of Error.

Comes now the defendant, Puget Sound Electric Railway, a corporation, and files the following assignments of error, upon which it will rely upon its prosecution of its writ of error, in the above-entitled cause, in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause:

I.

The Court erred in overruling defendant's peti-

tion for a new trial on the grounds therein set forth.

II.

Misconduct of plaintiff's attorneys in that the attorney for the plaintiff intimidated one of the plaintiff's witnesses during the course of the trial by threatening to have him arrested for perjury if he should testify, and in attempting to intimidate witnesses.

III.

Misconduct of attorney for plaintiff in the statements before the jury, that said defendant's witness had perjured himself in the former trial of this action. [67]

IV.

The Court erred in giving the following instruction to the jury:

> "But the passenger and the plaintiff in this case by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety and because of that failure on his part to exercise ordinary care he is injured, why then he cannot recover, *even the* the defendant company or its servants are negligent."

For the reason that the plaintiff was not a passenger, but according to the evidence of the defendant, was running to get the car after the car had been put in motion, that the plaintiff was not a passenger or an intending passenger, but was a trespasser, and no exercise of ordinary care on his part would justify

him in attempting to board the car, and the instruction does not correctly state the duty of the defendant company in the premises, and defendant was entitled to have a jury correctly instructed as to the law relative to its defense.

V.

The Court erred in refusing to give defendant's requested instruction number five as follows:

> "You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion, he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars." [68]

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

VI.

The Court erred in refusing to give defendant's requested instruction number six as follows:

> "You are instructed that if you believe from the evidence that the train car of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an

act of negligence in attempting to get upon said car to prevent being left behind."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

WHEREFORE, defendant, plaintiff in error, prays that the judgment of the Honorable District Court of the United States for the Western District of Washington, Southern Division, rendered in the above-entitled cause, be reversed and that such direction be given that full force and efficiency may inure to the defendant by reason of defendant's defense to said cause.

F. D. OAKLEY,
Attorney for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [69]

Petition for Writ of Error.

Comes now the defendant herein, Puget Sound Electric Railway, and says that on or about the 8th day of June, 1917, this Court entered judgment herein in favor of the plaintiff and against the defendant in the sum of $3,500, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this de-

fendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant comes now by its attorney and prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals.

And the defendant further petitions this Honorable Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be [70] made fixing the amount of security which this defendant shall give and furnish upon said writ of error, and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

F. D. OAKLEY,
Attorney for Defendant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [71]

Order Allowing Writ of Error.

On this 16th day of October, 1917, came the defendant herein, Puget Sound Electric Railway, by its attorney, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, and said defendant having duly filed an assignment of errors intended to be urged by it and the Court being advised in the premises,

IT IS HEREBY ORDERED, that a writ of error be and is hereby allowed, to have reviewed, in the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the judgment entered herein, and it is further ordered that the amount of the bond on said writ of error is hereby fixed at the sum of $5,000.00, to be given by the defendant, and upon the giving of said bond, the judgment heretofore rendered will be superseded pending the hearing of said cause, in the [72] Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF, the above order is granted and allowed, this 16th day of October, 1917.

EDWARD E. CUSHMAN,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [73]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Puget Sound Electric Railway, a corporation, the defendant above named, as principal, and National Surety Company, a corporation, organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the plaintiff in the above-entitled action, in the sum of Five Thousand Dollars ($5,000.00), for which sum, well and truly to be paid to said Alexander Matson, his executors, administrators, and assigns, we bind ourselves, our and each of our successors, and assigns, jointly and severally, firmly by these presents.

SEALED with our seals this 16th day of October, 1917.

THE CONDITION of this obligation is such that whereas, the above-named defendant, Puget Sound Electric Railway, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas, the said Puget Sound Electric Railway, desires to supersede

said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States [74] Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, the condition of this obligation is such that if the above-named Puget Sound Electric Railway, a corporation, shall prosecute said writ of error to effect, and answer all costs and damages awarded against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise the Court may enter summary judgment against said Puget Sound Electric Railway and said surety for the amount of such costs and damages awarded against said Puget Sound Electric Railway, and this obligation to remain in full force and effect.

PUGET SOUND ELECTRIC RAILWAY.
By F. D. OAKLEY,
Its Attorney.
JONES & HART CO.,
Agents.

NATIONAL SURETY COMPANY.
(Corporate Seal.) By E. M. HAYDEN,
Resident Vice-President.
By F. H. SWEETLAND,
Resident Assistant Secy.

Approved this 16th day of October, 1917.
EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 16, 1917.

Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [75]

Order Extending Time to and Including December 17, 1917, to File Record and Docket Cause in Appellate Court.

For good cause shown, it is by the Court here now CONSIDERED, ORDERED and ADJUDGED that the time within which to file in the United States Circuit Court of Appeals for the Ninth Circuit, the transcript, record or return on Writ of Error herein, be and the same is hereby extended to and including the 17th day of December, A. D. 1917.

Dated this 13th day of November, A. D. 1917.

EDWARD E. CUSHMAN,
District Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 13, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [76]

Certificate of Clerk U. S. District Court to Original Exhibits.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of Alexander Matson, Plaintiff,

versus Puget Sound Electric Railway, a Corporation, Defendant, No. 1980, in said District Court, as required by praecipe of F. D. Oakley, attorney for plaintiff in error, filed and shown herein, as the originals thereof appear on file and of record in my office in said district at Tacoma; and that the same constitutes my return on the annexed Writ of Error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of error, the original Citation and the original order extending time to file the record in the United States Circuit Court of Appeals; and that I am transmitting herewith, attached to the bill of exceptions herein, the original exhibits filed in said case, as commanded by the order settling said bill of exceptions, said exhibits being as follows:

Defendant's Exhibit "A," Photograph.
Defendant's Exhibit "B," Photograph.
Defendant's Exhibit "D," Photograph.
Defendant's Exhibit "E," Map of Location of Track in Pacific City.
Defendant's Exhibit "F," Photograph.
Defendant's Exhibit "G," Photograph.
Defendant's Exhibit "H," Original Complaint in case No. 1779.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the plaintiff in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making transcript of record and return, 173 folios at 15¢ each.....$25.95

Certificate of Clerk to Transcript, 3 folios at 15¢ each and seal..... .65

ATTEST my hand and the seal of said District Court at Tacoma in said District, this 12th day of December, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk. [77]

In the United States District Court, Western District of Washington, Southern Division.

#1980.

ALEXANDER MATSON,
Plaintiff,

vs.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,
Defendant.

Additional Praecipe for Transcript of Record.

To the Clerk of said Court:

Please include in the transcript to be sent to the United States Circuit Court of Appeals the following pleadings and papers:

1. Complaint (original).
2. Answer thereto.

3. Petition for removal of cause from the Superior Court of the State of Washington to the U. S. District Court.

4. Bond for Removal.

RALPH WOODS,
CHAS. L. WESTCOTT,
Attorneys for the Plaintiff and Defendant in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 8, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[78]**

In the Superior Court of the State of Washington for the County of Pierce.

No. 38,610.

1980.

ALEXANDER MATSON,

Plaintiff,

vs.

PUGET SOUND ELECTRIC RAILWAY COMPANY, a Corporation, and JOHN DOE,

Defendants.

Complaint in Matson v. Puget Sound Electric Ry. Co. in Superior Court.

Now comes the plaintiff in the above-entitled cause and complaining of the defendant herein says:

I.

Plaintiff is a resident of Tacoma, Pierce County, Washington, of lawful age, and prior to the matters hereinafter referred to was a strong and able-bodied

man, earning and capable of earning three ($3.00) dollars per day.

II.

Defendant is a corporation, having a principal place of business in said City of Tacoma, and is a common carrier of passengers, and as such common carrier maintains and operates an electric railway running from Tacoma in Pierce County to Seattle in King County, and having as a station on said line, at which it receives and delivers passengers, a place known as Pacific City.

III.

The defendant John Doe, whose true name is to plaintiff unknown, is a resident of the County of Pierce, and State of Washington, and at the time of the injury to the plaintiff hereinafter set forth, was the conductor in charge [79] and control of the train of defendant Puget Sound Electric Company as hereinafter set forth.

IV.

In the late evening of Saturday, March 20, 1915, the plaintiff went to the station of defendant company at Pacific City for the purpose of taking a passenger train of defendant company for transportation from said Pacific City to Tacoma, said train being due and expected to arrive at Pacific City at about eleven o'clock P. M. Plaintiff remained in said station until the said train approached said station, when plaintiff went to the platform for the purpose of boarding said train. When the said train arrived at the station it stopped and discharged one passenger, and plaintiff thereupon, while said

train was at a standstill, attempted to board the said train by taking hold of the handholds on the front platform of the rear car, but before plaintiff could step upon said train, said train was started by a jerk which threw plaintiff under the wheels of said rear car and his left foot was run over and cut off at a point near the ankle.

V.

The injury to the plaintiff as aforesaid was caused by the negligence of the defendants in allowing its said train at said station to stop at said station for so short a period of time that after the discharge of incoming passengers the plaintiff, as an outgoing passenger, did not have time to board said train in safety; and further to the negligence of defendants in starting said train while plaintiff was in the act of boarding said train; and further to the negligence of the defendants in failing to safeguard and protect the plaintiff in boarding said train; and further to the negligence of defendants in permitting said train to stop at said station for [80] so short an interval that plaintiff was unable to board said train in safety, and in the further negligence of the defendants in starting said train while plaintiff was in the act of boarding said train.

VI.

Plaintiff says that by reason of his injury aforesaid he was subjected to great pain and suffering, and after delay was removed to a hospital in Tacoma, where he was placed under an anesthetic and his foot was amputated; that plaintiff continued to suffer

great pain and anguish for a long time after said amputation, and was confined in said hospital for several weeks, and by reason of said injury plaintiff is permanently maimed and will for the rest of his life be a cripple and his earning capacity will be permanently impaired, to the damage of the plaintiff in the sum of three thousand ($3,000.00) dollars.

WHEREFORE, plaintiff prays that he do have and recover of the defendants damages in the sum of three thousand ($3,000.00) dollars, together with his costs and disbursements in this action to be taxed.

RALPH WOODS,

Attorney for Plaintiff, Suite 717–18–19, Tacoma Bldg., Tacoma, Wash.

State of Washington,
County of Pierce,—ss.

Alexander Matson, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the within and foregoing complaint, knows the contents thereof and believes the same to be true.

ALEXANDER MATSON. [81]

Subscribed and sworn to before me this 18th day of June, 1915.

RALPH WOODS,

Notary Public in and for the State of Washington, Residing at Tacoma.

Filed in Superior Court, Sep. 15, 1915. E. F. McKenzie, Clerk. By Piper, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [82]

In the Superior Court of the State of Washington in and for the County of Pierce.

No. 38,610.

ALEXANDER MATSON,

Plaintiff,

vs.

PUGET SOUND ELECTRIC RAILWAY, a Corporation, and JOHN DOE,

Defendants.

Answer in Matson v. Puget Sound Electric Ry. in Superior Court.

The defendant for answer to the complaint of the plaintiff filed herein, alleges as follows:

I.

For answer to paragraph one of said complaint, this defendant alleges that it has no information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

II.

For answer to paragraph two of said complaint, this defendant admits the same and each and every allegation therein contained.

III.

For answer to paragraphs four, five, and six of said complaint this defendant denies the same and each

and every allegation therein contained, and particularly denies that plaintiff was damaged in the sum of $3,000.00, or in any other sum whatever, as therein alleged.

Further answering and as a further, separate and first affirmative defense, this defendant alleges:

I.

That if the plaintiff received any injuries at the time and place and in the manner as alleged in his complaint, [83] which this defendant denies, then the said accident which resulted in said injuries was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that when said car was started from said Pacific City, after having permitted a passenger to alight therefrom, neither the plaintiff nor anybody else was on the platform to become a passenger on said car, and that if plaintiff attempted to board said car he did so after said car had been started and set in motion and without the knowledge of the defendant or its employees, and if plaintiff undertook to board the said car he heedlessly and recklessly undertook to board the same in an improper manner while the same was in motion, and failed to exercise his mental faculties in any way to observe, escape, and avoid the risks and dangers of his position, which were open and apparent to him and could have been easily avoided and that he failed to take proper care to provide for his personal safety.

J. A. SHACKLEFORD,
F. D. OAKLEY,
Attorneys for Defendant.

State of Washington,
County of Pierce,—ss.

F. D. Oakley, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant company in the foregoing answer named; that he makes this verification for and on its behalf being authorized so to do; that he has read said answer, knows the contents thereof, and that the same is true.

F. D. OAKLEY. [84]

Subscribed and sworn to before me this 29th day of September, 1915.

GARDA FOGG,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

We hereby acknowledge due and legal service upon us of the within Answer at Tacoma, Washington, this 29th day of Sept., 1915.

FRANK H. KELLEY,
RALPH WOODS,
Attorneys for Plf.

Filed in Superior Court. Oct. 4, 1915. E. F. McKenzie, Clerk. By G. F. M., Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [85]

In the Superior Court of the State of Washington in and for the County of Pierce.

No. 38,610.

ALEXANDER MATSON,

Plaintiff,

vs.

PUGET SOUND ELECTRIC RAILWAY COMPANY, a Corporation,

Defendant.

Petition for Removal of Cause to United States District Court.

To the Honorable Judges of the Above-entitled Court:

Your petitioner, Puget Sound Electric Railway Company, a corporation, respectfully represents to this Honorable Court:

I.

That your petitioner is the defendant named in the above-entitled action; that it is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

II.

That the above-entitled action is a suit of a civil nature at common law, and is brought by the plaintiff to recover damages for personal injuries alleged to have been sustained by plaintiff on March 20th, 1915, through the negligence of the defendant in the operation of one of the interurban trains run and operated by said defendant near the city of Tacoma. That at the time said action was started plaintiff claimed

damages in the sum of Three Thousand ($3,000.00). That on the 21st day of January, 1916, the plaintiff filed an amended complaint herein, based upon the same cause of action as hereinabove alleged, but demanding damages in the sum of Ten Thousand Dollars ($10,000.00), and that the matter now in controversy in said suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). [86]

III.

That said suit is entirely between citizens of different States, to wit, between the plaintiff, who your petitioner avers, was, at the time of the commencement of this action, ever since has been, and now is a resident and inhabitant of the State of Washington, and not of any other State, and the defendant, which was at all of said times, and still is, a citizen and resident and inhabitant of the State of New Jersey, and not of the State of Washington.

IV.

That your petitioner desires to remove this cause from the Superior Court of the State of Washington, in and for the County of Pierce, to the District Court of the United States for the Western District of Washington, Southern Division, and offers and files herewith a bond with good and sufficient surety for their entering in said District Court within thirty days from the date of the filing of this petition a certified copy of the record in said suit, and for paying all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto.

That the amended complaint herein was served upon defendant on the 21st day of January, 1916, at which time the above action first became removable, and not before, and that the time within which this defendant is required by the laws of the State of Washington to answer or plead to the said complaint of the plaintiff has not yet expired.

WHEREFORE your petitioner prays that said surety and bond be accepted, and that this cause may be removed to the District Court of the United States for the Western District of Washington, Southern Division, pursuant to the statutes of the United States in such case made and provided, and that no [87] further proceedings be had herein in this court, except to make an order of removal herein.

PUGET SOUND ELECTRIC RAILWAY,
By J. H. SHACKLEFORD,
F. D. OAKLEY,
Its Attorneys.

State of Washington,
County of Pierce,—ss.

F. D. Oakley, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the foregoing petition named; that the same is a foreign corporation and he makes this verification for and on its behalf, being authorized so to do; that he has read said petition, knows the contents thereof, and that the same is true.

F. D. OAKLEY.

Subscribed and sworn to before me this 24th day of January, 1916.

R. W. JONES,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

I hereby acknowledge due and legal service upon —— of the within —— at Tacoma, Washington, this 24th day of Jan., 1916.

RALPH WOODS,
Attorney for Plff.

Filed in Superior Court, Jan. 24, 1916. E. F. McKenzie, Clerk. By Libby, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [88]

In the Superior Court of the State of Washington in and for the County of Pierce.

No. 38,610.

ALEXANDER MATSON,

Plaintiff,

vs.

PUGET SOUND ELECTRIC RAILWAY COMPANY, a Corporation,

Defendant.

Bond for Removal.

KNOW ALL MEN BY THESE PRESENTS: That we, the Puget Sound Electric Railway Company, a corporation, organized and existing under

and by virtue of the laws of the State of New Jersey, as principal, and Casualty Company of America, a corporation, organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto Alexander Matson, the plaintiff, in the above-entitled action, in the penal sum of Five Hundred Dollars ($500.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our representatives, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of January, 1916.

UPON THE CONDITION, NEVERTHELESS, THAT, whereas the said Puget Sound Electric Railway has petitioned the Superior Court of the State of Washington, in and for the County of Pierce, for the removal of the above-entitled cause therein pending, wherein said Alexander Matson is plaintiff and the Puget Sound Electric Railway is defendant, to the District Court of the United States for the Western District of Washington, Southern Division. [89]

NOW, THEREFORE, if the said Puget Sound Electric Railway shall enter into the District Court of the United States for the Western District of Washington, Southern Division, within thirty days from the date of filing of said petition a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto,

then this obligation shall be void; otherwise to be and remain in full force, virtue and effect.

PUGET SOUND ELECTRIC RAILWAY.
By J. A. SHACKLEFORD,
F. D. OAKLEY,
Its Attorneys.

CASUALTY COMPANY OF AMERICA.
[Corporate Seal] By F. H. SWEETLAND,
Its Attorney in Fact.

I hereby acknowledge due and legal service upon —— of the within ——, at Tacoma, Washington, this 24th day of Jan., 1916.

RALPH WOODS,
Attorney for Plff.

Filed in Superior Court. Jan. 24, 1916. E. F. McKenzie, Clerk. By Libby, Deputy.

Ent. Book of Bonds, No. M, page 263.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 25, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [90]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from 78 to 90, inclusive, contain a true and correct copy of the record and proceedings

in the case of Alexander Matson, Plaintiff, versus Puget Sound Electric Railway, a Corporation, Defendant, No. 1980, in said District Court, as required by praecipe of Ralph Woods and Chas. L. Westcott, attorneys for defendant in error, filed and shown herein, as the originals thereof appear on file and of record in my office in said district at Tacoma.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the defendant in error herein, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making transcript of record and return, 28 folios at 15¢ each.....$4.20

Certificate of Clerk to transcript, 3 folios at 15¢ each and seal..... .65

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 12th day of December, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk. [91]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Plaintiff in Error,

vs.

ALEXANDER MATSON,

Defendant in Error.

Writ of Error.

United States of America.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Western District of Washington, Southern Division, GREETING:

Because, in the record and proceedings, as also in the said District Court before you, or some of you, between Alexander Matson, defendant in error, and Puget Sound Electric Railway, a corporation, plaintiff in error, a manifest error hath happened, to the great damage of the said Puget Sound Electric Railway, plaintiff in error, as by its complaint herein appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States

Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, in said circuit, on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 17th day of October, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington, Southern Division.

By F. M. Harshberger,
Deputy.

Service of the above and foregoing writ of error by the receipt of a copy thereof is hereby acknowledged this 17 day of Oct. 1917.

RALPH WOODS,
CHAS. L. WESTCOTT,
Attorneys for Defendant in Error.

[Endorsed]: No. 1930. In the United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Electric Railway, a Corporation, Plaintiff in Error, vs. Alexander Matson, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division.

Oct. 17, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Plaintiff in Error,

vs.

ALEXANDER MATSON,

Defendant in Error.

Citation on Writ of Error.

United States of America.

The President of the United States of America, to Alexander Matson, Defendant in Error, GREETING:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said Court, in the city of San Francisco, and State of California, within thirty days from the date of this Citation, to wit, within thirty days from October 17th, 1917, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, Western District of Washington, Southern Division, wherein Puget Sound Electric, plaintiff in error, and Alexander Matson, is defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy

justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of this Court this 17th of October, 1917.

[Seal] EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Southern Division.

Service of the above and foregoing Citation, the receipt of a copy thereof is hereby acknowledged this 17th day of October, 1917.

RALPH WOODS,
CHAS. L. WESTCOTT,
Attorneys for Defendant in Error.

[Endorsed]: No. 1930. In the United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Electric Railway, a Corporation, Plaintiff in Error, vs. Alexander Matson, Defendant in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 17, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Plaintiff in Error,

vs.

ALEXANDER MATSON,

Defendant in Error.

Order Extending Time to and Including December 17, 1917, to File Record and Docket Cause in Appellate Court.

For good cause shown, it is by the Court here now CONSIDERED, ORDERED and ADJUDGED that the time within which to file in the United States Circuit Court of Appeals for the Ninth Circuit, the transcript, record or return on writ of error herein be, and the same is hereby extended to and including the 17th day of December, A. D. 1917.

Dated this 13th day of November, A. D. 1917.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: No. ——. In the Circuit Court of Appeals of the United States, for the Ninth Circuit. Puget Sound Electric Railway, Plaintiff in Error, vs. Alexander Matson, Defendant in Error. Order Extending Time to File Transcript, Record or Return. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 13,

1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 3092. United States Circuit Court of Appeals for the Ninth Circuit. Puget Sound Electric Railway, a Corporation, Plaintiff in Error, vs. Alexander Matson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed December 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

PUGET SOUND ELECTRIC RAILWAY, a Corporation,

Plaintiff in Error,

vs.

ALEXANDER MATSON,

Defendant in Error.

Stipulation Omitting Original Exhibits from Printed Transcript of Record.

It is hereby stipulated by and between the parties hereto that the original exhibits sent to the appellate court for the inspection of that court need not be printed or copied into the printed record.

F. D. OAKLEY,
Attorney for Plaintiff in Error.
RALPH WOODS,
Attorney for Defendant in Error.

[Endorsed]: No. 3092. In the United States Circuit Court of Appeals, Ninth Circuit, Western District of Washington. Puget Sound Electric Railway, a Corporation, Plf. in Error, vs. Alexander Matson, Def. in Error. Stipulation Omitting Original Exhibits from Printed Transcript of Record. Jan. 21, 1918. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND ELECTRIC RAILWAY, a corporation, *Plaintiff in Error,* vs. ALEXANDER MATSON, *Defendant in Error.*	No. 3092

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

F. D. OAKLEY,
Attorney for Plaintiff in Error.

408 Perkins Bldg., Tacoma, Wash.

Allen & Lamborn Printing Co., Tacoma, Wash.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND ELECTRIC RAILWAY, a corporation, *Plaintiff in Error,* vs. ALEXANDER MATSON, *Defendant in Error.*	No. 3092

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case was brought by the defendant in error to recover damages for injuries sustained, as he alleges, while attempting to board an Interurban train operated by plaintiff in error at Pacific City, Washington.

"That on the 20th day of March, 1915, plaintiff went to the station of the defendant, at Pacific City, for the purpose of boarding the train of defendant for transportation to Tacoma; that the said train, arriving at the said station, stopped and discharged one passenger, and that thereupon, while the said train was at a standstill, plaintiff attempted to board the same, but that while he was in the act of boarding the said train it was suddenly started by a jerk which threw plaintiff under the wheels of the rear car of said train, which ran over his left foot and mangled and cut a part thereof so that it became necessary that a part of the foot should be amputated and removed.

"That the said injury to plaintiff was caused by the negligent starting of the said train by defendant, its agents and servants, without warning to him, while plaintiff was in the act of boarding the same and while he was holding one of the rods provided for the purpose of aiding and assisting in the boarding of said train, and to the further negligence of the defendant in not permitting the train to remain stationary a sufficient length of time for plaintiff to

board it, and in not providing some means whereby the said train would remain stationary long enough for the plaintiff to board it, and in not providing for some means by which the said train would be kept stationary while it was being boarded by plaintiff; and to the further negligence of the defendant in not providing some means by which the motorman or the operator of the said train was informed and knew that the plaintiff was in the act of boarding it."

The defendant in its answer denied the negligence complained of and for an affirmative defense alleged:

"That if the plaintiff sustained any injuries at the time and place alleged in his amended complaint herein, concerning which this defendant has no information, and therefore denies the same, the same were caused and occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that he heedlessly and recklessly undertook to board the said train in an improper manner while the same was in motion, and at the time said train was put in motion neither plaintiff nor any other passenger was on the platform of said station or attempting to board the said train when the same was put in motion, and that if plaintiff attempted to board said train he did so after the same was put in motion, and after the doors and vestibule of said train had been closed, and that plaintiff failed to exercise his mental faculties in any way to observe, avoid, and escape the risks and dangers of attempting to board a moving train, and that he failed to

take proper care to provide for his personal safety."

Plaintiff's version of how the accident occurred is incorporated in Transcript of Record on pages 20 to 25, inclusive, and is as follows:

"My name is Alexander Matson. I was born in Finland in 1889 and came to the United States about eleven years ago. I worked for the New York Central on a pile-driver and at many other places. About seven years ago I came to the Pacific Coast. I worked in California, Idaho, Oregon and Washington in logging camps, saw mills, smelters and at other common labor. On March 20th, 1915, I was in Seattle and went from there to Pacific City, arriving at the interurban station at about nine o'clock P. M. I waited for the interurban train going to Tacoma which came along about eleven o'clock. When the train came in to Pacific City it stopped right at the depot and let one man off the car so I was standing at the lower end of the depot, the end towards Seattle. I did not signal the cars because I did not know they had any signal-post there at the depot at that time, because I had never been at a way station between Tacoma and Seattle before, so I was standing at the lower end of the depot when the train came in and stopped, and one man got off the train, and I started to go up to board the car, and I grabbed the handhold with my right hand, and I was going to step on the car, like a man always used to do, when he gets on a car, so the train started up with a jerk, and she pulled me then, overbalanced me,

and throwed me around, and the wheel went sideways across over my foot. I did not see the conductor at any time."

CROSS-EXAMINATION.

"I was standing close to the turnstile about two or three yards from the turnstile, when the train stopped. Before the accident 'I went a couple of times through that turnstile.' I passed the man who got off the car when he was a little way from the turnstile. I had just taken a few steps and he passed me on the platform. I did not run to catch the car, just took an ordinary walk. The car was stopped when I took hold of it, and I didn't notice the conductor or collector or motorman at all. The vestibule was open. The car stopped about in front of the depot. Mr. Straub came to the hospital to see me a day or two after the accident. Mr. Woods brought up a contract for this case and the first complaint was filed the following Saturday, March 27th."

Defendant's Exhibit "H" is the original complaint filed in the above court March 17th, 1915.

Exhibits "A" and "B" are photographs of the depot at time of accident.

"I was never at the station before and didn't attempt to flag the train, I supposed all trains stopped there. I was six feet from the turnstile and didn't think the train would stop there and I started up."

A. I stayed right there and waited for the car to stop, to slow down.

Q. And when the man got off, you started ahead?

A. I started to go up to take that car.

Q. Now, just take a look at Defendant's Exhibit "B." Now, tell me the point on that photograph where you passed this man when you started up to catch the car.

A. Where, towards that man?

Q. Yes.

A. Just a little way up.

Q. Would it be about the point "X" in that circle?

A. It might have been about that, a few steps. I could not exactly say the distance.

Q. Now, last fall didn't you say this in answer to this question:

> "Q. Now, just look at this exhibit. I want you to mark with a pencil when you passed the man on the platform. A. I think I passed him just here (indicating). Q. Will you mark that 'X' with a circle around it? Now, where you put that 'X' with a circle around it on Defendant's Exhibits 'A' and 'B' is where you passed this man that got off the train, this man that you passed? A. Yes."

Would you say that would be right now, the same as you testified before?

A. As you recall it, that is where you passed this man? A. Yes, sir.

Q. Now, here is another question: "Q. How many feet ahead had you walked when you passed him?" "A. I had not walked, I was just standing up against the end of the platform." Do you remember testifying that way? I want you to understand it: "How many feet ahead had you walked when you passed him? A. I had not walked, I was just standing up against the end of the platform." Do you remember of answering that that way?

A. Yes, I remember it when I was standing down there, and then I started to walk up to get the car.

Q. You testified this morning that you walked and he walked?

A. Yes, sir.

Q. You testified the other time, "I had not walked. I was just standing up against the end of the platform." Wasn't that your testimony before?

A. I do not remember.

Q. "Q. You had not started ahead? A. No, sir. Q. He passed you right where you stood? A. No, sir, I was just starting to go up there. Q. How far did you walk? A. A couple of steps only. Well, I started to go up and he walked past by me. Q. That would be how many yards from the turnstile where you passed? A. It must have been something like three yards from the turnstile." Do you remember that? A. Yes, sir.

Q. That is about right, is it not?

A. Yes, I think that is about right.

"I saw a man when he came from the car, he could not have come from any place else. I was down on the platform and it was dark there and I can't say exactly what step it was he got off of. I cannot say how he stepped off, but he got off the car. I passed him back near the turnstile. When I got hold of the car with my right hand it started up with a jerk and pulled me ahead and overbalanced me. I picked myself up from off the platform and crawled right up on the end of the platform. I had been lying right on the ground there. My head was lying towards Tacoma. When I boarded the car the door of the car was right opposite the door of the depot. The wheels on the last truck ran over me. The company paid all doctor, hospital and medical bills.

"On the day of the accident I left Seattle and went to Kent, and walked from Kent to Auburn. I was in Auburn the best part of the day, leaving there between four and five o'clock in the afternoon, and then walked on the Milwaukee tracks to Pacific City, a distance of three or four miles, and got at Pacific City about nine o'clock. When I got there I made up my mind to go to Tacoma, and had money to pay my fare to Tacoma."

The passenger who alighted from the train at Pacific City referred to by plaintiff, Matson, was Roy Baumgardner, whose testimony on page 34 of the Record is as follows:

"I live in Namba, Idaho, with my father and mother working on their ranch. Have been there about three years. At the time of the accident I was living at Pacific City. On the night of the accident in controversy I got on the train at Auburn about 11:00, after having some dental work done. I was in the front part of the rear car and recognize the conductor here in Court as the conductor in charge of the car I was in. As we were coming in to Pacific City the conductor opened the trap door in the vestibule and the door was then pulled in and I stepped off. I was standing right behind the conductor as close as I could get without being in the road. *When I stepped off the car there was nobody on the platform at any place or near the depot, and no one indicated any intention of boarding the car. I then went out of the turnstile going north and there was nobody on the platform while I was walking along it. When I got out of the turnstile I noticed a man across the track running towards the turnstile. He passed me about four feet from me. He was running towards the depot. The Interurban train was moving when I got to the turnstile. I looked back once and noticed a man who was inside the turnstile, and just as I looked back it looked to me like he was attempting to board the car.* I was not sure because I did not pay so much attention. The lights were burning good and the road was lit up and I would have no difficulty in seeing a person on the platform but there was no one there. I first heard that the man was injured the next evening."

Mr. M. M. Shull saw Roy Baumgardner after he had passed thru the turnstile on his way from the depot and at the same time saw a man running in the road towards the depot. His testimony on page 36 of the Record is as follows:

"I live on a fruit ranch in Yakima County. At the time of the accident I lived in Pacific City. About 11:00 that night I was standing in front of my son's store which I was tending for him. This store is about sixty-five feet from the depot. I closed the store about 11:00 or a few minutes after, and saw the Interurban come in from Seattle to Tacoma. There were two lights on the outside of the store next to the street. They burn all night and throw a very good light directly across the road. *I had just come out of the door when the train was standing there. Baumgardner he was about the North side of the street just crossing the road. I saw another man just a moment before. He was running in the road towards the depot right about the middle of the street and the train was standing there then.* I did not see the train start up and didn't pay any further attention to this man. I saw this man about ten or fifteen seconds before I saw Roy. I did not see him go through the turnstile or as far as the turnstile."

CROSS-EXAMINATION.

"I did not see Matson run around the back of the car. I saw Baumgardner just after I saw this man running. I was standing right in front of the store on the porch. There is some lights on the poles

shown at the point "J" on Defendant's Exhibit "E," those lights were put in later. There were lights on the depot. This man when I saw him was about the middle of the street shown on the map, going towards the platform. Baumgardner was on the North side of the street. I think he went straight across the street from the turnstile. *I did not see Baumgardner and this man pass, I saw the man running first; then in probably fifteen seconds I saw Baumgardner.* I saw Baumgardner at the point I marked with the letter "P" on the map, and "P-prime" at the place where the man was running. I could see the man because there are two strong electric lights on the building and lights on the depot."

REDIRECT EXAMINATION.

Q. When you fixed this point "P," P-prime, on the map, what did you mean by that? Did you mean them to be the exact location or just approximately? A. I did not mean it to be exact.

Q. It may be two or three feet off or more than that? A. It might be."

E. M. Newcomb testified that he was the first person to find the plaintiff, who was then inside of the depot, after the accident, and that at the time he saw him plaintiff's breath smelled of whiskey and the plaintiff, in his judgment, was intoxicated. Record, page 33.

There were two cars on the train with a con-

ductor in charge of each car. One of the conductors, William Maurer, in charge of the rear car which Matson said he was attempting to board, saw no one on the platform and no one was attempting to board the car when he closed the vestibule door and platform. His testimony is as follows: Record, pages 30-31.

"I live in Seattle. Have been working as conductor for the defendant company about twelve years and was in charge of the rear car of the train in controversy. A passenger got on at Auburn. Trains stop at Pacific City only on signal. We stop only when we have passengers to let off or pick up. When we approached Pacific City the passenger got up and came to the front door and opened it just as the train came in and stopped. *I opened the trap which covers the steps on the inside flush with the platform and then I stepped to one side to let him off. The door cannot be opened without the trap down. The passenger was standing on the platform ready to get off and nobody was on the station platform to board the train.* The lights of our car and the lights on the station light up the platform so you could see anyone there. *I did not see anyone walking from the rear of the car as if they were going to approach it and there was nobody signalling or attempting to board the car when the signal was given to go ahead. As soon as the passenger got off I looked to see if there was anyone to get on and there was no one there, and I gave the signal to McClintock with my hand to go ahead and he pulled the*

bell. Just as he pulled the bell I closed the door. The car did not start with any violent or unusual jerk. I did not hear of this accident until 10:00 the next day when the agent called me up.

CROSS-EXAMINATION.

"I was not back in the middle of the car when the car started. I did not get off the car that night. We are always two or three minutes late and we might have been two or three minutes late this time. I can tell exactly where I stood when we were at Pacific City. A signal board is provided at the station for passengers wanting to board the car. If we do not get a signal we think they are only standing there.

REDIRECT EXAMINATION.

"It is the duty of both conductors to watch signals of passengers given for boarding the train."

Mr. H. E. McClintock, the conductor in charge of the head car, saw no one on the platform and no person was attempting to board the train when it started, and testified at follows: Record, page 29.

"I live in Sacramento, California, and am employed as conductor on the Northern Electric Railway. At the time of the accident in controversy I was the conductor on the head car. We left Seattle at 10:05. After leaving Algona conductor Maurer on the rear car gave a signal with the bell cord to the motorman to stop at Pacific City. We stopped; one passenger alighted from the rear car, after which I

looked out and saw there was nobody to board the train and I stepped over on the other side of the vestibule, pulled the bell cord for the motorman to go ahead and we started. I stepped back into the vestibule and looked out again. After leaving Pacific City the vestibule doors were closed on each car. I raised up the trap and opened the outside door. I was in the vestibule when the car stopped at Pacific City and only one passenger got off and nobody got on, and nobody was waiting on the platform to board the train. The car started in the ordinary manner without any jar or jolt at all. Algona is about two miles from Pacific City and Auburn about three miles from Pacific City. Defendant's Exhibit "D." is a photograph of the rear end of motor car Number 516 in my charge at that time. I didn't hear anything of the accident until the following day."

The motorman, Henry Martin, did not see anyone on the platform or about the station when he pulled into the station, and when he stopped. His testimony is as follows: Record, pages 27-28.

"I live at Renton and have been employed for the defendant company as motorman for seven years and was motorman in charge of the train in controversy. We left Seattle at 10:05 and arrived at Pacific City about 11:00 o'clock. The number of the motor was 516. The train consisted of two cars. One in charge of Conductor Maurer and the other in charge of Mr. McClintock. *While pulling into Pacific City I got a signal to stop there and made just a short stop of twenty-five or thirty seconds and then*

got a signal to go ahead and started it up. The headlights were burning and also the lights at the station. *I did not see anyone on the platform or about there at the time.* The cars are each about fifty-five feet long and the front end of the motor was stopped fifteen or twenty feet south of the south end of the platform and south of the fence. I started the car just as usual, one point on the controller right after the other. *It is impossible to start the motor in such a manner as to throw a man a distance of six or eight feet while attempting to board the car. If the car is started suddenly the power is thrown off by the automatic circuit breaker. I did not see any passengers get off the car at the station. I was on the opposite side of the car from the platform.*

CROSS-EXAMINATION.

"I did not hear of the accident until the next day. That night I went back to Seattle on the local train and do not remember whether I stopped at all the stations or not on the return trip. I did not see anyone on the platform. My attention was called to the accident the next afternoon. I know that I did not start until I got a signal, but do not know where the conductor was when the signal was given. We were about five minutes late at Pacific City. When the train pulls into the station the lights are not dim because we are drifting for some distance before we start to stop. When we start the lights are dim."

The attention of the Court is directed to the photographs taken three days after the accident in-

troduced in evidence as Defendant's Exhibits A and B, which show the true condition of the station at the time of the accident. The turnstile in controversy is shown to be at the end of the platform near the highway. Plaintiff testified that on the day of the accident he left Seattle and went to Kent and walked from Kent to Auburn. He left Auburn between four and five o'clock in the afternoon and then walked on the Milwaukee tracks to Pacific City, a distance of three or four miles, and got at Pacific City about 9:00 o'clock, P. M. He said, "When I got there I made up my mind to go to Tacoma." He was at the station something over two hours. He testified that when he saw the train he walked back and remained within two or three feet of the turnstile. That he made no attempt to flag the train either by pulling the semaphore signal, which was installed at the depot and is shown in the exhibits, nor did he wave his hand or use any other means whatever to stop the train. He testified that he stayed within two or three feet of the turnstile until the train stopped, then he started up to board the train, which he stated "did not stop very long, just an instant, to let a passenger alight. I did not see the conductor." He testified that he passed the passenger who got off the car a short distance from the turnstile at the point marked X with a circle around it shown on Defendant's Exhibits A and B. If he did not see the conductor he was not where the passenger alighted from the train and was not ready to board the train at the time the train was started. Two disinterested witnesses, Baumgardner

and Shull, saw him out in the road beyond the turnstile after the train started and Baumgardner, the passenger who stepped off the car, said there was nobody that he could see on the platform as he alighted from the train, but he did see a man running to catch the train. Baumgardner was not on the platform when Matson attempted to board the train, or he would have heard Matson's cries for help. Plaintiff further testified that his foot was not cut off on the depot platform, but that he was dragged beyond the fence, as shown in the photographs, near the semaphore.

At the close of the evidence plaintiff in error requested an instruction in writing directing the jury to bring in a verdict in favor of the defendant, which instruction was denied, and the Court, after giving its instructions, submitted the case to the jury, which returned a verdict for the plaintiff in the sum of $3,500.00. Defendant thereafter made a motion for a new trial, which was overruled, and this Writ of Error is thereupon obtained.

ASSIGNMENTS OF ERROR.

I.

The Court erred in overruling defendant's petition for a new trial on the grounds therein set forth.

II.

Misconduct of plaintiff's attorneys in that the attorney for the plaintiff intimidated one of the plaintiff's witnesses during the course of the trial by

threatening to have him arrested for perjury if he should testify, and in attempting to intimidate witnesses.

III.

Misconduct of attorney for plaintiff in the statements before the jury, that said defendant's witness had perjured himself in the former trial of this action.

IV.

The Court erred in giving the following instruction to the jury:

> "But the passenger and the plaintiff in this case by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety and because of that failure on his part to exercise ordinary care he is injured, why then he cannot recover, *even if* the defendant company or its servants are negligent."

For the reason that the plaintiff was not a passenger, but according to the evidence of the defendant, was running to get the car after the car had been put in motion, that the plaintiff was not a passenger or an intending passenger, but was a trespasser, and no exercise of ordinary care on his part would justify him in attempting to board the car, and the instruction does not correctly state the duty of the defendant company in the premises, and defendant was entitled to have a jury correctly instructed as to the law relative to its defense.

V.

The Court erred in refusing to give defendant's requested instruction number five as follows:

> "You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion, he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

VI.

The Court erred in refusing to give defendant's requested instruction number six as follows:

> "You are instructed that if you believe from the evidence that the train of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

For the reason that said instruction correctly states the law applicable to the facts, and the Court

refused and negleced to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

ARGUMENT.

Assignments II. and III.

The misconduct of Mr. Woods, attorney for plaintiff, during the trial of the case was so flagrant as to require a reversal of the judgment. During an intermission of the Court while the defendant was putting in its evidence, Mr. Woods approached Mr. M. M. Shull, one of defendant's witnesses, in the corridors of the Court just outside the court door, and tried to prevent him from testifying by threatening to send him to the penitentiary. What occurred is shown on page 39 of the Record and is as follows:

Q. Now, did you have a conversation this morning with Mr. Woods in reference to what would happen to you if you testified this morning?

A. Mr. Woods spoke to me in the hall out there this morning.

Q. What did he say with reference to your appearance here as a witness?

A. He said if I lied like I did the other time he would send me to the penitentiary.

Q. When did he tell you that?

A. About an hour ago.

Q. Was Roy Baumgardner there when he told you that?

A. He might have been in the hall, I did not notice.

Q. He told you if you lied like you did the other time he would have you arrested for perjury, didn't he?

A. Yes, and have me sent to the penitentiary.

(Witness excused.)

The COURT.—(Addressing Mr. Woods.) If he lied the other time, why have you not had him arrested before this time?

Mr. WOODS.—Your Honor will remember that in the other trial—(interrupted).

Mr. OAKLEY.—I do not think it is necessary to have any explanation.

The COURT.—If you made that remark in good faith—(interrupted).

Mr. WOODS.—I made that remark in good faith.

The COURT.—Why didn't you have him arrested when this trial came off? Why were you holding it over him when he was a witness in this case?

Mr. WOODS.—The testimony is practically the same now as it was before, that he stood there fifty or seventy-five feet away—he testified that he recognized the witness—I understood the witness to testify in the other trial that he recognized this man —(interrupted).

The COURT.—I did not ask you to rehash this testimony, but if you thought he had perjured him-

self and if you were able to prove it, it would seem to be your duty to start that prosecution and not try to influence his testimony in this trial by talking to him about it.

Mr. WOOD.—Well, all I want is the truth, and I cannot see where he is telling the truth.

Mr. OAKLEY.—It is an attempt to intimidate a witness.

United States, complied Stats., 1916, Sec. 10305; (Crim. Code, Sec. 135), provides that:

"Whoever corruptly or by threats of force or by any threatening letter or communication shall endeavor to influence, intimidate or impede any witness in any court of the United States - - - or endeavor to influence, obstruct or impede the due administration of justice therein shall be fined not more than One Thousand dollars or imprisoned not more than one year or both."

The attempt of Mr. Woods to intimidate Mr. Shull by threatening to send him to the penitentiary in case he testified unfavorable to plaintiff was clearly a violation of this act.

Wilder vs. U. S., 143 Fed., 433.
Davey vs. U. S., 208 Fed., 237.

Mr Woods was also guilty of contempt of Court under Sec. 238, *Judicial Code;* Sec. 1245. *U. S. Compiled Statutes,* 1916, in attempting to obstruct the administration of justice.

In *Ex Parte Lavin,* 131 U. S., 267; 33 *L. Ed.,* 150, the Supreme Court of the United States punished Lavin for contempt of court for approaching a witness in hallway of the court and improperly endeavoring to deter him from testifying.

The following authorities are also in point:

Ex Parte Robinson, 86 U. S., 505; 22 L. Ed., 205.

U. S. vs. Carroll, 147 Fed., 947.

U. S. vs. Huff, 206 Fed., 700.

In re Brule, 71 Fed., 943.

U. S. vs. Toledo Newspaper Co., 220 Fed., 458.

In re Maury, 205 Fed., 626 (Ninth Circuit).

In *State vs. Wingard,* 92 Wash., 219, the Supreme Court of Washington sustained the conviction of Wingard for an attempt to obstruct justice in trying to induce witnesses not to appear at the trial of a case in a court of a Justice of the Peace.

So also in *State vs. Bringgold,* 40 Wash., 12, a conviction was sustained where the defendant attempted to persuade a witness not to testify by resorting to threats to blacken her good name if she did so, although she did appear and testify following the threats.

This Court very recently in the case of *In re Independent Publishing Company,* 240 Fed., 849, had occasion to review many cases upon this point

and we see no necessity of burdening the Court with the citation of further authorities.

It has been held that public policy requires that such conduct irrespective of the question whether it influenced the particular verdict, should be discouraged.

Harvester Co. vs. Hodge, 6 Pa. Dist., 378.

Drake vs. Newton, 23 N. J. L., 111.

McGill vs. Seaboard Air Line R. Co., 55 S. E., 216.

The peculiar interest of Mr. Woods in attempting to intimidate a witness not to testify is explained by the testimony of the plaintiff himself. Record, page 22.

"Mr. Straub" (connected with Mr. Woods in some capacity in his office) "came to the hospital to see me a day or two after the accident, Mr. Woods brought up a contract for this case and the first complaint was filed the following Saturday, March 27th," just one week after the accident.

Mr. Woods not only then was guilty of the violation of a criminal act of the United States and also guilty of contempt of court, but was likewise guilty of gross misconduct in stating in the presence of the jury while the witness was on the stand that the witness was guilty of perjury. Such conduct and threats on the part of an attorney must necessarily greatly excite and irritate a witness and the ends of justice are so obstructed that the rights of a litigant can only be protected by the Court refusing to tolerate

such practice. For this reason alone the judgment should be reversed and a new trial ordered.

ASSIGNMENT IV.

The Court erred in giving the following instruction to the jury:

> "But the passenger *and the plaintiff in this case* by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety and because of that failure on his part to exercise ordinary care he is injured, why then he cannot recover, even if the defendant company or its servants are negligent." Record, 45-64.

The Court, in its instruction No. II, instructed the jury that "a common carrier of passengers is bound to the highest degree of care consistent with the practical operation of its roads and trains," and then proceeded to instruct the jury as to when a man becomes a passenger. After doing so the Court said, "*but the passenger and the plaintiff in this case* . . . . . ,"—thus instructing the jury that the plaintiff was to be considered a passenger. Defendant's affirmative defense denied that plaintiff was a passenger and alleged affirmatively that if he attempted to board the train he did so after the doors of the train had been closed and the train had been set in motion. In our statement of the case we called the Court's attention to the witnesses who saw the plaintiff beyond the turn-

stile in the road after the train had been started. The train men testified that he was not attempting to board the train when they closed the vestibule doors, and plaintiff's own testimony was to the effect that he was standing near the turnstile a considerable distance from where the train stopped, and did not attempt to start for the train until it had stopped, and according to his own testimony he did not attempt to give any signals to stop the train and did not show any indication of boarding the same until the passenger had walked practically one car length from where he alighted, and that he passed the passenger who alighted from the train a few feet from the point where plaintiff had been waiting. He further testified that the rear trucks of the rear car ran over his foot. Defendant's defense then was based upon the theory that the plaintiff was not a passenger in contemplation of law at the time of the accident, and this issue should have been submitted to the jury and it was error for the Court to instruct the jury as a matter of fact that the plaintiff was a passenger.

Defendant in addition to other objections to the instruction, excepted to the same for the reason that if the plaintiff was not a passenger as it contended he was not, and was running to board the car he was a trespasser and no exercise of ordinary care on his part would justify him in attempting to board the car. The instruction was erroneous and the defendant was deprived from having its defense submitted to the jury, and the jury were erroneously informed

that the exercise of ordinary care on the part of the plaintiff would justify him in attempting to board the train after it had started and its vestibule doors had been closed.

After the defendant had objected to the instruction complained of, the court instructed the jury that if plaintiff "flew at the side of the car, the defendant company did not owe him any exercise of ordinary care. All it did owe him was for defendant and its servants to refrain from wilfully and purposely injuring the plaintiff." This instruction, while in itself couched in language not justified by any facts in evidence states the law as to the degree of care required of the defendant in reference to a trespasser attempting to board a moving car. But the statement that he *flew* at the side of the car did not fairly present the case to the jury. Nor did this instruction in any way meet the objection defendant raised that the instruction here complained of to the effect that the exercise of ordinary care on the part of the plaintiff would justify him in attempting to board the train if moving. This instruction deprived the defendant of a fair trial which requires a reversal of the judgment.

ASSIGNMENTS V-VI.

The Court erred in refusing to give defendant's requested instructions numbered five and six as follows:

> "You are further instructed that if you believe from the evidence that at the time of this

accident the plaintiff attempted to board said car while the same was in motion, he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

"You are instructed that if you believe from the evidence that the train car of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

These two requested instructions covered the law applicable to defendant's affirmative defense, which as has been stated was based upon the theory that plaintiff was not a passenger but attempted to board the train after the same was in motion. Appellant was entitled to have its theory of the case which constituted an affirmative defense fairly submitted to the jury by proper insructions, and the refusal of the Court to give these instructions was reversible error. In support of this contention we cite the following authorities found from among the many sustaining this rule of law.

"It is the duty of the Court to submit to the jury and give instructions thereon any issue, theory, or defense, which the evidence tends to support. 38 Cyc., 1626."

Callaghan vs. Boston Elev. Ry. Co., 102 N. E., 330.

Baltimore & O. R. Co. vs. Peck, 101 N. E., 674.

Pack vs. Camden Interstate Ry. Co., 157 S. W., 906.

Zelvain vs. Tonopah Belmont Dev. Co., 149 Pac., 188.

Board of Comrs. etc. vs. Pindell, 85 Atl., 1041.

McKennan vs. Omaha & C. B. St. R. Co., 146 N. W., 1014.

Bering Mfg. Co. vs. Femelat, 79 S. W., 869.

St. Louis, etc., Ry. C. vs. Overturf, 163 S, W., 639.

Polk vs. Spokane Interstate Fair, 73 Wash., 610.

Hoffman vs. Watkins, 78 Wash., 118.

ASSIGNMENT NO. I.

The facts shown herein in the statement of the case and the discussion of the foregoing assignments of error will, we believe, lead the Court to conclude that the trial court erred in overruling the petition for a new trial presented in this case. We believe defendant's requested instruction to direct a verdict for the defendant should have been granted and that in any event a new trial should have been ordered to rectify the errors made at the trial of this case.

In conclusion we submit that the misconduct of

the defendant in error was of such a vicious and prejudicial nature as to require a reversal of this judgment and also that the defendant was not given a fair trial by reason of the instruction complained of as given by the Court, and by the refusal of the Court to grant defendant's requested instructions five and six.

We therefore request the Court to reverse the judgment entered herein and direct a new trial of th case.

Respectfully submitted,

F. D. OAKLEY,

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND ELECTRIC RAILWAY, a corporation,
Plaintiff in Error,
—vs.—
ALEXANDER MATSON,
Defendant in Error.

No. 3092.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Defendant In Error.

RALPH WOODS AND
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Brief of Defendant In Error.

PRELIMINARY STATEMENT.

This is an action for damages for injuries received by Alexander Matson, defendant in error (plaintiff below), caused by the negligence of the Puget Sound Electric Railway, plaintiff in error (defendant below). From a verdict and judgment for the plaintiff, the defendant sues out a writ of error to the Circuit Court of Appeals.

THE NEGLIGENCE OF THE DEFENDANT ALLEGED WAS:

1. Starting the train without warning and while the plaintiff had hold of the rods provided for the purpose of assisting and aiding in the boarding of said train.

2. In not permitting the train to remain stationary long enough for plaintiff to board.

3. In not providing means whereby the train would remain stationary long enough for plaintiff to board it.

4. In not providing means by which the motorman or operator of said train was informed and knew that the plaintiff was in the act of boarding.

THE DEFENCE OF THE DEFENDANT WAS:

1. General denial.

2. Contributary negligence,

(a) In boarding the train while in motion.

(b) That neither the *plaintiff nor any other passenger was on the platform at the station.*

(c) That the doors and vestibules of train were closed before plaintiff arrived.

The issues were decided in favor of the plaintiff.

THE STATEMENT OF THE CASE BY PLAINTIFF IN ERROR IS UNFAIR.

1. No question is raised as to the sufficiency of the evidence to support the verdict, yet defendant by its statement has endeavored to make it appear that the evidence was insufficient. For emphasis as to insufficiency he has italicized the matters he calls especial attention to.

2. In settling the statement of facts counsel for defendant stated to the trial judge he had just two questions to raise by writ of error, to-wit, misconduct of counsel, and error in instructions; therefore, only so much of the evidence as was necessary to pass on those alleged errors was permitted in the bill. Now, after the elimination has been made of all testimony, except so much as is necessary for the understanding of the alleged errors, counsel misconstrues the evidence.

The jury passed on the evidence, and the trial judge reviewed the same on motion for a new trial. A case passed on by a federal jury and a federal judge is generally properly decided, at least so far as the issues of fact are concerned.

The whole statement is so unfair that a new statement is necessary.

STATEMENT OF THE CASE.

The Puget Sound Electric Railway, defendant, owns and operates an electric interurban between the cities of Seattle and Tacoma, running approx-

imately 50 passenger trains a day through Pacific City.

On the ~~30~~ 20th day of March, 1915, at about nine p. m., Matson, plaintiff, went into the station at Pacific City for the purpose of taking a train to Tacoma. One train went through on the way to Tacoma, but did not stop. The regular local, 11 o'clock, Tacoma-bound train, came in late, stopped, and let off a passenger. The plaintiff having waited at the depot for about two hours, upon seeing the next train coming, and seeing it was going to stop, stepped out of the depot and down the platform. When the train stopped he went to the front door of the rear car, where the vestibule was open. As he took hold of the handle bars for the purpose of getting on board, the car started suddenly, throwing the plaintiff against the side and partly under the car. The rear wheels ran over his foot, mashing it so badly that amputation of part of the foot was necessary. There was a conductor on each car to assist passengers on and off and to collect fares. Neither conductor got off at the depot at Pacific City to see whether or not any passengers were ready to board the train. The depot and platform were not well lighted. The night was dark and foggy.

After the accident plaintiff crawled over the platform and into the damp, cold depot; took off his sweater and wrapped it around his mangled

and bloody stump to keep it warm. There he lay until his cries brought help.

The train went on through to Tacoma, then started on its return trip to Seattle. As it again approached Pacific City, Seattle-bound, several persons, who had come to assist the plaintiff, flagged the train to stop, but it swept on through, disregarding the flagging and notwithstanding the fact that there were three or more passengers on board bound for Pacific City.

A day or two after the accident defendant altered its platform and depot by raising the platform several inches and by erecting a brilliant cluster of lights near the depot.

No question is raised in this court as to the amount of the verdict. It should have been for a larger amount. Evidently the jurors penalized plaintiff some because of the rebuke of the court administered to his counsel.

Plaintiff's injuries are permanent and serious. The fore part of the foot is gone, leaving nothing but the heel. He still has considerable pain, especially during rainy weather. He will never be able to walk without crutches. He will have to undergo another operation and have his whole foot removed, then get an artificial foot; or else continue to use crutches.

No question is raised as to the sufficiency of the evidence to support the verdict, and therefore the court below, in settling the bill of exceptions, cut from the record all evidence he considered immaterial to the issues to be determined in this court.

ARGUMENT.

An argument hardly seems necessary on the part of the plaintiff (defendant in error).

1st. Defendant (plaintiff in error) assigns as error the overruling of a motion for a new trial. This court will never pass on such an assignment.

2nd. Misconduct of counsel is assigned as error in that counsel spoke to a witness about his testimony on a former trial being false. Counsel was rebuked by the trial court. No exceptions were taken.

3rd. Error is assigned stating that the court gave a wrong instruction. The court instructed on the theory of the defense advanced in its pleadings and on its requested instructions.

4th. Error is assigned in refusing certain instructions. The court gave 26 written instructions, taking 14 pages of the record, covering the case fully. Also he gave several oral instructions. The instructions given included in substance the requested instructions.

While we do not consider further argument necessary we shall discuss briefly the assignments of error.

ASSIGNMENT OF ERROR I.

Counsel contends that the lower court erred in refusing to grant its motion for a new trial. Counsel misconceived the functions of this court. The matter has long been settled that the Circuit Court of Appeals will not consider such an assignment of error. The rule is so well known that we need not cite any authorities to support it.

ASSIGNMENTS OF ERROR II AND III.

AS TO MISCONDUCT OF COUNSEL.

When approached by a witness (M. M. Shull) in an endeavor to explain his discredited testimony given at former trial, counsel for the plaintiff said: "If you lie like you did in the other trial, I have a good notion to have you arrested for perjury," or words to that effect.

The witness told of this conversation on the stand.

The court rebuked counsel, but did not permit any explanation except that the remark was made in good faith, and the matter ended when counsel said, "Well, all I want is the truth, and I cannot see where he is telling the truth."

The witness was a fair sample of a small town witness, eager to attend the trial after seeing his neighbors subpoenaed. Nearly two years after the accident he volunteered his services to the defendant. This was at the time of the first trial. It is not unfair to assume that the claim agents for the company, immediately after the accident, had raked this little town (population 50 or 75) for every one who could testify, but they did not find him until he became anxious to be present out of curiosity.

On the witness stand he testified that he stood in the doorway of a fruit stand or small store 75 or 100 feet away and saw the plaintiff running west to catch the train.

The jury believed his testimony to be false. It was physically impossible on that dark, foggy, Puget Sound night for any person to stand where he said he stood and identify any one at the place where he said plaintiff was. Further, his testimony was contradicted not only by witnesses for the plaintiff, but other witnesses of the defendant. Again he was discredited by his own cross-examination and by his demeanor on the witness stand. It is unfortunate for us that the demeanor of this witness cannot be shown in this court by the record.

Surely, if the jury believed that there was an attempt to procure false testimony or to intimidate

any witness so that he would give untrue testimony, it would have returned the verdict promptly for the railway company.

The witness was not intimidated. He testified fully and freely. He testified so fully and freely that no one in the court room believed him. Counsel, instead of trying to obstruct and impede the due administration of justice, was trying to get at the truth.

No exception was taken by the defendant.

Even if the defendant had taken an exception, what possible error did the court commit? He censured counsel, which fact helped the defendant, instead of injured it. Could the rebuke administered to counsel possibly help the plaintiff? It could have no other effect than prejudice the jury against the plaintiff and his counsel.

No citation of authorities seems necessary, as the alleged error of the trial court is frivolous.

ASSIGNMENT NO. IV.

Defendant objects to part of instruction No. II, relative to the degree of care owed to the plaintiff.

Instruction No. II is as follows:

> "As has been stated to you in the arguments, there is a difference in the degree of care which the defendant, the railroad company,

owes to a passenger, and the degree of care the passenger owes to himself. A common carrier of passengers is bound to the highest degree of care consistent with the practical operation of its road and trains, but before you can apply this rule, and hold the defendant to that high degree of care, *it will be necessary to find by a fair preponderance of the evidence that the plaintiff had become a passenger. It is not every man who is running along the street to catch the train who is a passenger. Before he can be considered a passenger, he must have either gotten upon the train or be in such a position, either mounting the train, or having shown by his conduct that he desired to board the train, has to either be seen by the agents of the common carrier operating a train, and they have to realize that he desires to take the train, or, at least, be in such position and have so indicated his intentions that they should realize it if they were exercising due diligence in keeping a look-out to see who was going to board that train at their regular stop.* But the passenger, and the plaintiff in this case, by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety, and because of that failure on his part to exercise ordinary care he is injured, why, then, he cannot recover, even though the defendant company or its servants are negligent."

After defendant excepted to the instruction relative to the degree of care that a common carrier owed, then for the first time he claimed plaintiff was a trespasser.

The court then instructed:

"Gentlemen of the Jury: The court did not mean in any way to intimate that the plaintiff was a passenger; whether the plaintiff was a passenger or not, he was bound to exercise ordinary care for his own safety. (Record, p. 57).

"If the train was moving and the vestibule was closed and there was no invitation on the part of the defendant company to encourage the plaintiff in any way to board the car, and he flew at the side of the car, the defendant did not owe him any exercise of ordinary degree of care. All it did owe him was for itself and its servants to refrain from wilfully and purposely injuring the plaintiff." (Record, p. 58).

Point I.

The defendant made no claim in its pleadings, nor in its evidence, nor in its argument that the plaintiff was a trespasser. It tried the case on the theory that the plaintiff was a passenger guilty of contributory negligence. It pleaded (Record, page 7, lines 4 and 5) *"that neither the plaintiff nor any other passenger was on the platform."*

Also, in its requested instruction No. III (Record, page eleven), it refers to the plaintiff as a passenger in the following language, *"that neither the plaintiff nor any other passenger was on the platform."* The trial court gave this requested instruction. (See instruction XIV. Record, pages

49 and 50, wherein plaintiff is referred to as a passenger).

Point II.

After all the evidence was in, and the counsel had argued the case and the court had instructed the jury, then for the first time counsel for the defendant (under his breath and in such a manner that the jurors could hardly hear, if they could hear at all) stated to the court that the plaintiff was a trespasser.

The instructions fully covered the law, even if the plaintiff were a trespasser. The defendant proposed no written instructions covering the liability of a common carrier to a trespasser, and the court fully covered the matter when he instructed, "All it did owe him (in such a case) was for itself and its servants to refrain from wilfully and purposely injuring the plantiff."

The portion of the instruction complained of when read with the whole instruction and also read in connection with all the instructions given (particularly instruction XV) is a correct statement of the law.

ASSIGNMENTS OF ERROR V AND VI.

These alleged errors are just as unmeritorious as the preceding ones. The court was more than

fair to the defendant. An instruction was given as follows:

> "Plaintiff must prove too by the fair preponderance of the evidence that while the defendant's train was at a standstill at Pacific City, plaintiff attempted to board said train, and while in the act of boarding same it was suddenly started by a jerk which threw plaintiff under the wheels of said train, causing the injury complained of * * *."

Said instruction was unfavorable to plaintiff, for a passenger may run to catch a car after the same is started and not be guilty of negligence as a matter of law. (*Eppendorf vs. Brooklyn City etc. R. R. Co.*, 69 N. Y. 195; 25 Am. Rep. 171).

The 26 written instructions covered the case fully and included the theory of the defendant's defense.

No authorities are necessary. The argument of the defendant is based upon a false premise. He assumes that the trial court did not instruct on his theory of the case. The court did instruct *on defendant's theory.*

THE ISSUE IN THE WHOLE CASE WAS WHETHER THE PLAINTIFF AS A PASSENGER HAD HOLD OF THE BARS OF THE CAR ABOUT TO ENTER OR WHETHER HE WAS RUNNING TO CATCH THE TRAIN AFTER THE VESTIBULE WAS CLOSED AND THE CAR WAS STARTED.

This issue was found by the jury in favor of the plaintiff.

AUTHORITIES.

For the convenience of the court we cite a few authorities as to the liability of a railroad toward a passenger:

> It is negligence to start a railroad train from a station while a passenger is actually getting on board, regardless of the length of the stop. *Texas & P. Ry. Co. vs. Gardner,* 114 F. 186, 52 C. C. A. 142.

> A person attempted to board a street car that had stopped at a usual place for stopping cars to take on passengers by taking hold of the hand rail and placing one foot on the platform step, when the car suddenly started up throwing him on the ground. *Held* to authorize a finding that the company was guilty of actionable negligence. *Wallen vs. Wilmington City Ry. Co.,* 61 A. 874; 5 Pennewill, 374.

> A street car company is liable to one injured by the car's starting while he was attempting to get on after it had stopped to take on passengers, although those in charge of the car had not seen him. *West Chicago St. R. Co. vs. James,* 69 Ill. App. 609.

Where plaintiff was injured by the sudden starting of a street car before he had succeeded in boarding it at a regular stopping place, and it appeared that at the time the conductor was not at his post of duty controlling the movements of the car, an instruction that such facts, if believed, were sufficient to establish the street car company's negligence was not error. *Clark vs. Durham Traction Co.*, 50 S. E. 518; 138 N. C. 77; 107 Am. St. Rep. 526.

It is the duty of the servants of a railroad in charge of a train to stop it a reasonable time to allow an intending passenger to board with safety. (Ky. 1904) *Mobile & O. R. Co. vs. Reeves*, 80 S. W. 471; 25 Ky. Law Rep. 2236. (Mo. App. 1905) *Lehner vs. Metropolitan St. Ry. Co.*, 85 S. W. 110; 110 Mo. App. 215. (Va. 1903) *Norfolk & A. Terminal Co. vs. Morris, Adm'x*, 44 S. E. 719; 101 Va. 422. (W. Va. 1905) *Normile vs. Wheeling Traction Co.*, 49 S. E. 1030; 57 W. Va. 132.

An attempt by a passenger to board a railway train will not as a matter of law be considered a negligent act, unless the attending circumstances so clearly indicate that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that, in the absence of circumstances leading to such a conclusion, the question of whether the act of negligence should ordinarily be left to the jury. Sec. 1182 Hutchinson on Carriers.

Where a passenger is thrown from the step of a car, while attempting to enter it, by the starting of the car before he is safely on, the railroad company is liable for the injuries received. *Hatch vs. Philadelphia & R. Ry. Co.*, 61 A. 480; 212 Pa. 29.

It is the duty of a conductor, before giving a signal to start, to see that all passengers are safely on board, and failure in this respect is not excused by the fact that the conductor did not *actually see a passenger attempting to get aboard. Dudley vs. Front Street Cable Railway* (Wn. Case), 93 Fed 128.

Where a carrier fails to give intending passengers a reasonable opportunity to enter a car in safety before the train starts, the failure to do so resulting in injury to a passenger, the carrier is liable. *Giovanelli vs. Erie R. Co.*, 76 A. 424; 228 Pa. 33.

It is the duty of a street car conductor to know when he starts his car that no person attempting to board is at that moment with one foot on the platform and the other on the ground, with his hand on the railing or otherwise in a position of danger, it being his duty to look around and see that all passengers are safely aboard, the passengers not being required to foresee a sudden starting of the car. *Snipes vs. Norfolk & Southern R. R.*, 56 S. E. 477.

It is a carrier's duty to give passengers a reasonable opportunity to board a train; and the mere moving of the train, whether by an ordinary and usual, or an unusual and unnecessary, jerk, while the passenger is on the car steps, and before he has had a reasonable opportunity to reach a place of safety, whereby the passenger is injured, is negligence. *Chesapeake & O. Ry. Co. vs. Borders*, 131 S. W. 388; 140 Ky. 548.

A carrier of passengers, stopping its train to take on or discharge passengers, is bound to hold the same reasonable length of time, and,

in the absence of contributory negligence by a passenger, is liable for injuries resulting from a failure to do so. *Choctaw, O. & G. R. Co. vs. Burgess*, 97 P. 271.

Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or clumsy, or is incumbered with children, packages or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as a matter of law that there was negligence in doing so. But in most cases it must be a question for a jury. Here there was nothing exceptional, and no reason apparent why plaintiff might not, with prudence, have expected to enter the car with safety. He had the right to expect that the speed of the car would continue arrested until he was safely on the car. It was the act of the driver in letting go the brake without notice, and thus suddenly giving the car a jerk while plaintiff was getting upon it, that caused the accident.

Upon all the evidence of this case it was for the jury to determine whether the plaintiff was chargeable with negligence, and whether such negligence contributed to the injury. *Eppendorf vs. Brooklyn City R. R. Co.*, 69 N. Y. 195; 25 Am. Rep. 171.

THIS WRIT WAS SUED OUT MERELY FOR THE PURPOSES OF DELAY.

April 15, 1915. An action was brought in the United States District Court on the cause of action sued on in this action.

May 3, 1915. Defendant moves to dismiss the action on the ground that the defendant was a New Jersey corporation and that the action should be brought in New Jersey by an alien.

May 24, 1915. Defendant, in the absence of the plaintiff and without plaintiff's knowledge took snap order of dismissal.

September 15, 1915. New suit filed in the Superior Court of the State of Washington against the defendant and John Doe, conductor.

January 14, 1916. Amended complaint filed by plaintiff. Defendant John Doe eliminated as a party.

January 26, 1916. Defendant files petition and bond for removal of said cause from Superior Court to the United States District Court, Western District of Washington, thereby bringing the case to the same court from which he had the same dismissed by snap order of May 24, 1915.

November 28, 1916. Plaintiff finally obtained a trial. Result was a disagreement.

Plaintiff could not obtain another trial until June 5, 1917, when he obtained a verdict.

Since the verdict the defendant has delayed so much that there is submitted herewith a motion to quash the bill of exceptions and affirm the judgment.

THE FOLLOWING FACTS OUGHT NOW TO BE CLEAR TO THE APPELLATE COURT.

I. That the plaintiff has been endeavoring for three years to obtain a final settlement of his case.

II. That the bill of exceptions was not filed within the term nor within the time allowed by the rules of the court. Therefore, it should be stricken.

III. The assignment of error on order overruling motion for new trial not only is without merit, but was only an excuse for the suing out of a writ of error.

IV. The assignment of error on alleged misconduct of counsel submits nothing for decision of this court.

V. The assignment of error on the instructions given or refused is frivolous.

Seven hundred years ago on the plains of Runny-

mede, Magna Charta was wrung from King John. In that great instrument the basic principle was laid down, "To none will we sell, to none will we deny, to none will we *delay right and justice.*" This extract from the charter contained a guaranty against the most prevalent abuses of the day.

The promises laid down in that document should be more strictly adhered to. Rule 30 of this court provides damages at a rate not exceeding ten per cent., in addition to interest, when an appeal or writ of error is sued out for the purposes of delay.

The appellate court should invoke said rule. If ever it should be applied, this is the proper case.

The plaintiff, crippled for life by reason of the defendant's negligence, has been kept from his due for three long years and justice and right have been delayed.

Respectfully submitted,

RALPH WOODS AND
CHARLES L. WESTCOTT,

Attorneys for Defendant in Error.

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Brief of Defendant In Error on Motion to Quash Bill of Exceptions and Affirm Judgment.

MOTION TO QUASH BILL OF EXCEPTIONS AND AFFIRM THE JUDGMENT.

Comes now Alexander Matson, defendant in error, and moves the court for an order quashing the Bill of Exceptions and for an affirmance of the judgment, for the following reasons:

I.

The proposed Bill of Exceptions was not served, nor filed during the term.

II.

The proposed Bill of Exceptions was not served nor filed within the time allowed by rule 75 of the United States District Court, Western District of Washington.

RALPH WOODS AND
CHAS. L. WESTCOTT,
Attorneys for Defendant in Error.

STATEMENT.

For the convenience of the court we give the following list of the dates and filing in this case since the entry of the verdict:

June 7, 1917	Verdict rendered.
June 8, 1917	Judgment entered.
July 2, 1917	Order made that all causes, motions, demurrers, and other matters now pending and not disposed of are continued until the next term.
July 2, 1917	TERM ENDED.
July 16, 1917	Petition for new trial.

July 23, 1917	Petition for new trial denied. Defendant granted 30 days to serve and file bill of exceptions.
Aug. 20, 1917	Proposed bill of exceptions served and filed.
Oct. 16, 1917	Assignment of errors filed. Petition for writ of error filed. Order allowing writ of error. Bond filed.
Nov. 13, 1917	Order extending time to December 17, 1917, within which to file record and docket case in appellate court.
Dec. 8, 1917	Order settling bill of exceptions, which included the following exception of plaintiff: "*Plaintiff excepts because the bill of exceptions was not served and filed within the time allowed by law and the rules of the court; and excepts to the signing of any bill of exceptions.* Exception is hereby allowed." (Signed by the Judge).

As will be seen, judgment was entered in this cause, June 8, 1917, and the term ended July 2, 1917.

At the time of the entry of the judgment the defendant failed to make the usual motion for a stay and for an extension of time within which to file his bill of exceptions. He did nothing until after the term.

ARGUMENT.

THE BILL OF EXCEPTIONS MUST BE PRESENTED TO THE TRIAL JUDGE WITHIN THE TERM WHEN THE CASE WAS TRIED.

In the leading case of *Michigan Insurance Bank vs. Eldred*, 143 U. S. 293; 36 Law Ed. 162, Mr. Justice Gray delivered the opinion of the court. It was held that the bill must be presented *during the term*, unless an order is made *during the term* extending the time. After the term all authority to allow a bill is lost save under very extraordinary circumstances.

The case of *Muller vs. Ehlers*, 91 U. S. 249; 23 Law Ed. 319, holds that bill of exceptions signed after the term is a nullity where no order is made during the term, and no consent is given by defendant in error.

To the same effect,

Morse vs. Anderson, 150 U. S. 156; 37 Law Ed. 1037;

and

U. S. vs. Jones, 149 U. S. 262; 37 Law Ed. 726;

Preble vs. Bates, 40 Fed. 745 (holding that the trial court has some discretion in the matter, but the discretion must be exercised at the same term).

See, also,

Rose's Code of Federal Procedure, vol. 2, page 1537, under title, "Bill to be Signed During Term," and

Reliable Incubator Co. vs. Stahl, 102 Fed. 590;

City of Manning vs. German Ins. Co., 107 Fed. 52.

True, the court made the usual order at the end of the term continuing all matters *undisposed of.* But this case was disposed of, judgment was entered, and application was not made *during the term* asking for extension of time within which to present a proposed bill of exceptions. In the case of *Costello vs. Ferrarini*, 165 Fed. 379, the court held that a general order such as was made in this case saved the plaintiff in error, provided the bill was *presented for allowance during the term*, but not yet acted upon by the court.

It is true, also, that an order was made, *after the term*, granting an extension of time within which to present a proposed bill of exceptions. But the court was without jurisdiction.

THE PROPOSED BILL WAS NOT PRESENTED WITHIN THE TIME ALLOWED BY THE RULES OF THE COURT

The rules of the District Court for the Western District of Washington provide that the bill of exceptions shall be served and filed within 10 days, at least, after the verdict.

Rule 75 is as follows:

"BILL OF EXCEPTIONS.—A bill of exceptions to any ruling may be reduced to writing and settled and signed by the judge at the time the ruling is made, or at any subsequent time during the trial, if the ruling was made during the trial, or within such time as the court or judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the clerk.

"If not settled and signed as above, provided, a bill of exceptions made be settled and signed as follows:

"The *party desiring the bill shall* within ten days after the ruling was made, or if such ruling was made during a trial, *within ten days after the rendition of the verdict*, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, *serve upon the adverse party a draft of the proposed bill of exceptions.* The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the

ruling tended to prejudice the rights of such party. Within ten days after such service, the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the clerk for the judge. The clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the judge, who must thereupon designate a time at which he will settle the bill; and the clerk must, as soon as practicable thereafter, notify or inform both parties of the time so designated by the judge. In settling the bill the judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it and must strike out of it all irrelevant, unnecessary, redundant, and scandalous matter. After the bill is settled it must be engrossed by the party who proposed the bill, and the judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the clerk."

The purpose of such a rule is to settle the facts in the case while the same are fresh in the memory of the trial judge.

Rule 74 provides when a new trial will be granted. Among the causes enumerated is the following:

(8) "Where the right to have a bill of exceptions has been lost without any fault or negligence on the party of the losing party."

The rule also provides that the petition for new trial shall suspend the operation of the judgment, any process thereon, and any writ of error. There is no provision in said rule for the suspension of the time within which to present a bill of exceptions. The usual practice in said court is to ask for and secure an extension of time when the verdict is rendered or when the judgment is signed.

Under rule 81 it is provided that an extension may be granted by order made before the expiration of time, and then such an extension will not be granted for more than 30 days.

Rule 81 is as follows:

> "When an act to be done in any action at law or suit in equity which may, at any time, be pending in this court, relates to the pleadings in the cause, or the undertakings or bonds, to be filed, or the justification of sureties, *or the preparation* of bills of exceptions, or of amendments thereto, or to the giving of notices of motions, the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by *order made before the expiration of such time;* but *no extension or extensions shall exceed* 30 *days in all,* without the consent of the adverse party; nor shall any such extension be granted if time to do the act or take the proceeding has previously been extended for 30 days by stipulation of the adverse party; and any extension by previous stipulation or order shall be deducted from the thirty days provided by this rule. It shall be the duty of every party, at-

torney, solicitor or counsel, or other person applying to the court or judge for an extension of time under this rule, to disclose the existence of any and all extensions to do such act or take such proceeding which have been previously obtained from the adverse party or granted by the court or judge; and *any extension obtained from the court or judge in contravention of this rule shall be absolutely null and void, and may be disregarded by the adverse party.* Nothing herein contained shall interfere with the power of the court to extend the time to do an act or take a proceeding in any cause until after some event shall have happened or some step in the cause shall have been taken by the adverse party."

The bill of exceptions, therefore, should be stricken and the judgment affirmed.

Respectfully submitted,

RALPH WOODS AND
CHARLES L. WESTCOTT,
Attorneys for Defendant in Error.

No. 3093

8

United States

Circuit Court of Appeals

For the Ninth Circuit.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Appellant,

vs.

R. PETERSEN,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3093

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index.

Index. Page

In the District Court of the United States for the Western District of Washington, Southern Division.

IN ADMIRALTY—# 858.

R. PETERSON,

Libelant,

vs.

GRAY'S HARBOR TUG BOAT COMPANY, a Corporation, et al.,

Respondents.

Praecipe for Apostles.

To the Clerk of the Above-entitled Court:

You will please prepare and send up to the United States Circuit Court of Appeals for the Ninth Circuit, apostles on appeal, within thirty days after the date of giving notice of appeal, said apostles to contain the following:

1.

A caption exhibiting the proper style of the court and the cause; and a statement showing the time of the commencement of this suit; the names of the parties, setting forth the original parties; the several dates when the respective pleadings were filed, and that there was no property attached or arrested; the different times when proceedings were had before the Court; the name of the Judge hearing the same; the date of the entry of the final decree; and the date when the notice of appeal was filed.

2.

All the pleadings. [1*]

3.

The stipulated record of the testimony and the maps and charts filed as exhibits in the case, with the proper certifications of the clerk.

4.

All opinions of the Court, whether upon interlocutory questions or finally deciding the cause.

5.

The final decree and the notice of the appeal.

6.

Assignment of error.

MORGAN and BREWER,
Proctors of the Respondent and Appellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 22, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [2]

In the United States District Court for the Western District of Washington, Southern Division.

No. 858.

R. PETERSEN,

Libelant,

vs.

GRAY'S HARBOR TUG BOAT COMPANY, a Corporation,

Respondent.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

Names and Addresses of Counsel.

Messrs. PAGE, McCUTCHEON, KNIGHT & OLNEY, Merchants Exchange Building, San Francisco, California,

IRA A. CAMPBELL, Esquire, Merchants Exchange Building, San Francisco, California,

E. C. HANFORD, Esquire, Colman Building, Seattle, Washington,

C. H. HANFORD, Esquire, Colman Building, Seattle, Washington,

Proctors for Libellant.

Messrs. MORGAN & BREWER, Hoquiam Washington,

Proctors for Respondent. **[3]**

Statement Under Admiralty Rule 4.

TIME OF COMMENCEMENT OF CAUSE.

December 7, 1910.

NAMES OF PARTIES.

R. Peterson, master of the ship "Jane L. Stanford," acting for himself, the owners and all parties in interest, libellant, and Gray's Harbor Tug Boat Company, a corporation, respondent.

DATES WHEN PLEADINGS WERE FILED.

Libel, with interrogatories propounded to respondent by libellant attached, on December 7, 1910.

Exceptions to libel *in personam* and answer to said libel, with answers to interrogatories attached, on January 4, 1911.

Exceptions to answers to interrogatories, on January 26, 1911.

Supplementary answer to interrogatory No. 3 propounded by libellant, on April 21, 1911.

ISSUANCE OF PROCESS AND SERVICE THEREON.

On December 7, 1910, upon the filing of the libel, citation was duly issued under the seal of the Court, which citation was afterwards, to wit, on the 9th day of December, 1910, returned and filed in court by the United States Marshal, with the following return of service thereon:

"I hereby certify that I served the within Citation at Hoquiam, Washington, on the 7th day of December, 1910, by then and there delivering to and leaving with E. O. McGlauflin, as manager of said defendant, Gray's Harbor Tug Boat Company, a corporation, at said time and place, a duly certified copy thereof. [4]

C. B. HOPKINS,
United States Marshal.
By H. J. DOTEN,
Deputy Marshal.

MARSHAL'S FEES.

Service, ... 2.00
Expenses, ... 8.90

Total Charge 10.90"

The respondent was not arrested, no bail was taken, no property was attached or arrested.

REFERENCE TO COMMISSIONER.

No question of fact was referred to any commis-

sioner or commissioners, but testimony was taken before commissioners and filed on the dates below stated:

December 27, 1910. Report of testimony taken before G. H. Marsh, United States Commissioner, of the following witnesses. R. Petersen, O. F. Thomsen, Fred Johnson and Albert Crowe on the part of libellant.

March 29, 1915. Report of testimony taken before Dan Pearsall, United States Commissioner, of the following witnesses: Mrs. Lillian Peterson and Captain R. Peterson on behalf of libellant, and Chris Olson, George Chicone, C. L. Davidson, Otto Rohme, G. B. Sanborn, H. K. Johnson and William King on behalf of respondent.

June 28, 1917. Report of testimony taken before A. C. Bowman, United States Commissioner, of Robert Petersen on behalf of libellant.

August 25, 1917. Report of testimony taken before Francis [5] Krull, United States Commissioner, of witnesses E. Alexander and Robert H. Lee, on behalf of libellant.

TRIAL.

On March 2, 1917, said cause came on for trial and hearing before Honorable Edward E. Cushman, one of the Judges of said court, upon the testimony then taken and filed herein together with the exhibits offered by the respective parties. Proctors for the respective parties appeared and argued said cause in open court and thereafter submitted written briefs to the Court. Thereafter on April 16, 1917, said Judge before whom said cause was tried and heard

duly filed his memorandum decision on the liability in said cause.

Thereafter in pursuance of a motion by libellant for a hearing on the amount of damages and order setting the same filed herein on June 13, 1917, a further hearing was had on July 9, 1917, before the Honorable Edward E. Cushman, Judge as aforesaid, upon testimony filed upon that question and the testimony of Arthur B. Hedges for libellant and Fred A. Ballin for respondent, taken in open court and afterwards reduced to writing and filed on the 16th day of July, 1917. Proctors for the respective parties appeared and argued said question of the amount of damages in open court, and later submitted written briefs to the court. On October 11, 1917, said Judge duly filed his memorandum decision on the amount of damages in said cause.

DECREE.

Decree in accordance with said decisions was made, filed and entered on October 19, 1917, and the same date an order was made, [6] filed and entered, fixing the amount of stay bond at $12,500.00.

NOTICE OF APPEAL.

Notice of appeal was filed on November 22, 1917, and thereafter on November 23, 1917, was served upon C. H. Hanford, proctor for libellant.

On November 22, 1917, assignment of errors, appeal bond in the sum of $250.00 and stay bond in the sum of $12,500.00, both approved by the Court, were also filed. [7]

In the United States District Court for the Western District of Washington, Western Division.

IN ADMIRALTY—No. 858.

R. PETERSEN,

Libelant,

vs.

GRAY'S HARBOR TUG BOAT COMPANY, a Corporation,

Respondent.

Libel In Personam.

To the Honorable Judge of the Above-entitled Court:

The libel of R. Petersen, master of the American barkentine "Jane L. Stanford," against the Gray's Harbor Tug Boat Company, in a cause of damages, civil and maritime, alleges as follows:

I.

That libellant, R. Petersen, is and was during all times mentioned herein master of the barkentine "Jane L. Stanford," an American vessel, and brings this libel against said respondent for and on behalf of the owners of said vessel and her cargo.

II.

That respondent, Gray's Harbor Tug Boat Company, is a corporation, but the state under the laws of which said corporation is organized is unknown to libellant, and libellant therefore demands strict proof of the same.

III.

That heretofore, on or about the 5th day of October, [8] 1910, the said barkentine, after being loaded with a full cargo of lumber, left the port of Aberdeen bound for the port of Brisbane, in tow of one of the tugs belonging to respondent, which tug was to tow said barkentine to sea; that upon arriving at the bar at the entrance of Gray's Harbor the master of said tug found the sea too heavy to cross said bar, and thereupon anchored said barkentine inside said bar, where she waited for fair weather until about the 25th or 26th day of October, 1910; that shortly after 1 P. M. of said latter day, respondent's tug "Cudihy" informed the master of said barkentine that the conditions on the bar were such that he could safely tow said vessel to sea, and thereupon a hawser was passed, and said tug, with said barkentine in tow, proceeded down through the channel across said bar to the open sea; that a heavy swell and sea was breaking on said bar, and in crossing the same said barkentine struck heavily thereon and by reason thereof sprung a leak necessitating her bearing away for the Columbia River, where, on the following day, she was picked up by a tug and towed to the port of Astoria, and thence to the drydock at the port of St. John's; that thereafter her cargo was partially discharged and the vessel was docked in the drydock belonging to the port of Portland and repairs of said damage resulting from said striking of said bar were made.

IV.

That the master of said tug was incompetent, in

that he was a man of intemperate habits and unfamiliar with the channel through which said barkentine was towed across said bar, which channel had recently formed and through which said master of said tug had never before navigated; that said barkentine, so far as the act and time of towing the same across said bar, was under the sole control of respondent, and said master of respondent's said tug negligently and carelessly [9] towed said barkentine to sea across said bar when the sea breakers on said bar were too heavy, and the depth of water on said bar too shallow to enable said barkentine to cross said bar in safety, and by reason thereof said barkentine struck on said bar and was badly damaged, as aforesaid.

V.

That by reason of said damage resulting from said striking of said bar, repairs to the bottom of said vessel were necessary, the total cost of which will approximate the sum of $2,000, the exact amount of which is unknown to libellant; the cost of discharging and reloading said vessel will be about the sum of $2,000, the exact amount of which is unknown to libellant; the cost of towing said barkentine into the Columbia River, to the port of St. Johns and return to sea, will be approximately the sum of $600, the exact amount of which is unknown to libellant; that further expenses have been and will be incurred, by way of wages and provisions to the crew, in the approximate sum of $1,000 and said barkentine will be detained in the prosecution of her voyage about forty-six days, to her loss and damage

in the approximate sum of $3,000; that the total amount of said loss and damage to libellant, by reason of the striking of said bar, is at present unknown to libellant, owing to the noncompletion of the repairs to said barkentine, but libellant believes the same will amount to the sum of $10,000.

VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law, [10] according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the respondent, a corporation, owner of said tug "Cudihy," and that they may be required to answer on oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment of the amount due, as aforesaid, with interest and costs, and that libellant may have such other and further relief as in law and justice they are entitled to receive.

R. PETERSEN.
By IRA A. CAMPBELL,
His Proctor.

PAGE, McCUTCHEON, KNIGHT & OLNEY,
IRA A. CAMPBELL,
Proctors for Libellant.

State of Washington,
County of King,—ss.

Ira A. Campbell, being first duly sworn, on oath deposes and says: That he is one of the proctors for

libellant herein; that he has read the foregoing libel, knows the contents thereof, and believes the same to be true; that he makes this verification for and on behalf of libellant, for the reason that said libellant is not within the jurisdiction of this Honorable Court.

[Notarial Seal] IRA A. CAMPBELL.

Subscribed and sworn to before me this 7th day of December, 1910.

B. M. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Filed U. S. District Court, Western District of Washington. Dec. 7, 1910. R. M. Hopkins, Clerk. By Sam'l D. Bridges, Deputy. **[11]**

Interrogatories Propounded to Respondent by Libellant.

Int. 1: When was the channel through which the barkentine "Stanford" was towed by the tug "Cudihy" formed?

Int. 2: What was the depth of water in said channel at the time said barkentine was towed to sea by said tug "Cudihy" and struck said bar?

Int. 3: Was it high tide at the time? If not, how long before high tide was it?

Int. 4: How long had the master of the tug "Cudihy" been in your employment prior to the time he towed said barkentine to sea?

Int. 5: On what date was he employed by you?

Int. 6: Had he ever towed a vessel to sea prior to the "Stanford" through the channel through which the "Stanford" was towed?

Int. 7: Is it not a fact that the master of the tug was a man of intemperate habits?

Int. 8: Do you know whether or not he had been discharged from the Government service for intemperance shortly before he took command of the tug "Cudihy," just previous to his towing said barkentine to sea? **[12]**

Int. 9: Had not the barkentine "Stanford" laid inside the Gray's Harbor bar approximately two weeks awaiting an opportunity when she could be towed across said bar by your tugs with safety?

PAGE, McCUTCHEON, KNIGHT & OLNEY,
IRA A. CAMPBELL,
Proctors for Libellant.

Filed U. S. District Court, Western District of Washington. Dec. 7, 1910. R. M. Hopkins, Clerk. By Sam'l D. Bridges, Deputy. **[13]**

In the District Court of the United States for the Western District of Washington, Western Division.

No. 858.

R. PETERSON,
Libellant,

vs.

GRAY'S HARBOR TUG BOAT COMPANY,
Respondent.

Exceptions to Libel in Personam and Answer to Said Libel, as Amended.

Comes now the respondent and excepts and objects to the libel *in personam* heretofore filed against it and served upon it for the reason that the same does not state facts sufficient in law to constitute a cause of action against this respondent and especially in this: that no sufficient charge of neglect nor any charge of fault or neglect was made therein against this respondent.

Answer.

And for further answer to said libel this respondent in answer to paragraph one (1) alleges that it has no knowledge or information as to the matters and things set up in said paragraph, and, therefore, demands strict proof of the same.

II.

In answer to paragraph two (2) of said libel this respondent admits that it is a corporation and alleges that it is a corporation organized under the laws of the State of Washington, and has its principal place of business in the city of Hoquiam, Chehalis County, Washington. **[14]**

III.

In answer to paragraph three (3) of said libel, this respondent alleges that it has no information as to the matters and things set up, particularly in lines 32 and 33 on page 1 and in lines 1, 2, and 3 on page 2 of said libel.

This respondent admits that upon arriving at the

bar the barkentine "Jane L. Stanford" was anchored in a safe place; that she there remained until about the 25th day of October, 1910; and that about the date last alleged this respondent's tug "John Cudahy" made fast to said barkentine and with her in tow proceeded across the bar to open sea. This respondent admits that there was a heavy swell and sea breaking on said bar, but alleges that such sea at the time of taking the vessel in tow and up to the time the vessel reached the bar was not extraordinarily heavy or unusual and was, in fact, safe for the purpose of towing out any vessel and particularly the "Jane L. Stanford," and as to the remainder of said paragraph this respondent asserts that it has no knowledge or information except as heretofore specifically admitted and, therefore, denies the same and demands strict proof thereof.

IV.

Answering paragraph four (4) of said libel, this respondent denies the same and the whole thereof.

V.

Answering paragraph five (5) of said libel, this respondent denies the same and the whole thereof.

AND FOR FURTHER ANSWER TO SAID LIBEL this respondent alleges: **[15]**

That on or about the date alleged in said libel, this respondent engaged for hire to tow the barkentine "Jane L. Stanford" to sea over the Grays Harbor bar; that such contract was the usual and ordinary towage contract and agreement and without any additional stipulations or warranties; that at the time chosen by its master to tow the vessel to sea, the con-

dition of the bar was good and safe for all purposes connected with the towing of vessels of the size and nature of the "Jane L. Stanford" to sea. That its tug "John Cudahy" was in good condition and suitable for that purpose and that the master of said tug Chris Olson, was a competent and experienced master authorized by the proper authorities to act as master of bar tugs on Grays Harbor and that for many years he had been engaged in towing over the Grays Harbor bar as master of tugboats; that the time and place selected by him for towing such vessel were proper and suitable and were made in the exercise of his best judgment and that this respondent and said master were without fault or neglect in undertaking and prosecuting such towage contract, and while proceeding to sea as before alleged and at about the time the "Stanford" had reached the shallowest portion of the bar, three extraordinarily heavy seas struck the vessel and that if the vessel struck upon the bar, such striking was caused by the fact that such extraordinarily seas reached the bar at that exact moment and that if any damage was caused to the vessel, it was caused by a peril of the sea and not through any fault or neglect of this respondent or its master; that no foresight or precaution which might have been examined or taken by this respondent or its master could foresee or anticipate such a contingency and that no action was possible to the master of the tug to prevent such injury after he became aware such seas were approaching. **[16]** That this respondent, the owner of the tug "John Cudahy" had prior to the time of such acci-

dent and at all times herein mentioned, exercised due diligence and all proper diligence to make its tug, the said "John Cudahy," in all respects seaworthy, and had at all times properly manned such tug and had properly equipped and supplied such tug, and that if any loss accrued to the libellant, such loss accrued from dangers of the sea or the acts of God and not from fault and errors and neglect of this respondent. This respondent therefore claims exemption of the laws of the United States of America in such cases made and provided.

WHEREFORE, having fully answered this respondent prays that it may go hence without day; that it may have its costs and disbursements to be taxed against the libellant and such other and further relief as to the Court may seem just.

MORGAN & BREWER,
Proctors for Respondents.

State of Washington,
County of Chehalis,—ss.

E. O. McGlauflin, being first duly sworn, upon oath, deposes and says: That he is the manager of the Grays Harbor Tugboat Company, respondent herein; that he has read the foregoing instrument, knows the contents thereof and that the same is true as he verily believes.

E. O. McGLAUFLIN.

Subscribed and sworn to before me this 31 day of December, A. D. 1910.

[Seal of Notary] WALTER C. GREGG,
Notary Public in and for the State of Washington,
Residing at Hoquiam in said State.

Filed U. S. District Court, Western District of Washington. Jan. 4, 1911. R. M. Hopkins, Clerk. By Sam'l D. Bridges, Deputy. [17]

In the United States District Court for the Western District of Washington, Western Division.

IN ADMIRALTY—No. 858.

R. PETERSON,

Libellant,

vs.

GRAY'S HARBOR TUG BOAT COMPANY, a Corporation, Respondent.

Answer of E. O. McGlauflin to Interrogatories.

United States of America,
Western District of Washington,—ss.

E. O. McGlauflin, being duly sworn, upon oath deposes and says: That he is the manager of the respondent herein Grays Harbor Tug Boat Company, and on its behalf answers the interrogatories propounded herein by the libellant as follows:

For answer to interrogatory one, he saith: That the Grays Harbor Tug Boat Company have been using the south channel for towing about eight months.

For answer to interrogatory two he saith: That he is informed and believes that at the time and place said barkentine was towed to sea by the tug "Cudahy" the depth of the water was about 27 feet.

For answer to interrogatory three he saith: That the said barkentine was towed to sea about 5 o'clock P. M. and that the tide was at the time mentioned, at about its greatest height for that day, and was at the time at the highest water suitable for towing purposes.

For answer to interrogatory four he saith: That the **[18]** master of the tug "Cudahy" had been in the employ of the Grays Harbor Tug Boat Company at various times for some years; that he was employed by the tugboat company during the months of April, May, June, July, in the year 1910, but he did not work during the months of August and September and during a part of October.

For answer to interrogatory five, he saith: That the master of the tug "Cudahy" was last employed by us on or about the 19th of October, 1910.

For answer to interrogatory six, he saith: That the master of the tug "Cudahy" had towed vessels to sea prior to the time he towed the "Stanford" and through the same channel.

For answer to interrogatory seven, he saith: That during the time the master of the tug "Cudahy" was in our employ and to the best of our information, was a man of temperate habits.

For answer to interrogatory eight, he saith: That he was not discharged from the Government's employ, but voluntarily terminated his employ.

For answer to interrogatory nine, he saith: That the barkentine "Stanford" had laid inside the bar approximately three weeks awaiting a time which

was in the judgment of captains of respondent's tugs suitable for towing to sea.

E. O. McGLAUFLIN.

Subscribed and sworn to before me this 31 day of December, A. D. 1910.

[Seal of Notary.] WALTER C. GREGG,
Notary Public in and for the State of Washington,
Residing at Hoquiam in said State.

Filed U. S. District Court, Western District of Washington. Jan. 4, 1911. R. M. Hopkins, Clerk. By Sam'l D. Bridges, Deputy. **[19]**

In the United States District Court for the Western District of Washington, Western Division.

IN ADMIRALTY—No. 858.

R. PETERSEN,

Libellant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Respondent.

Exceptions to Answers to Interrogatories.

Comes now the above-named libellant and excepts to the answers of the respondent to the interrogatories addressed to it in libellant's libel herein as follows:

First. Libellant excepts to the answer to first interrogatory, for the reason that instead of answering

said interrogatory fully, directly and positively, it answers the same evasively and indirectly, so far as it does answer the same, and omits wholly to answer when the channel referred to was formed, and that said answer is impertinent and scandalous.

Second. Libellant excepts to the answer to the third interrogatory, for the reason that instead of answering said interrogatory fully, directly and positively, it answers the same evasively and indirectly, so far as it does answer the same, and omits wholly to answer whether or not it was high tide, and if not, how long before high tide it was at the time the barkentine "Stanford" was towed to sea, and that said answer is impertinent and scandalous.

Third. Libellant excepts to the answer to the fourth interrogatory for the reason that instead of answering said interrogatory fully, directly and positively, it answers the same evasively **[20]** and indirectly, so far as it does answer the same, and omits wholly to answer how long the master of the "Cudahy" had been in the employ of respondent prior to the time he towed said barkentine to sea.

Fourth. Libellant excepts to the answer to the sixth interrogatory for the reason that said answer instead of answering the interrogatory, fully, positively and directly, answers the same evasively and indirectly, so far as it does answer the same, and omits wholly to answer whether or not said master had ever before towed vessels to sea through the same channel that the "Stanford" was towed by him.

Fifth. Libellant excepts to the answer to the

seventh interrogatory for the reason that instead of answering said interrogatory fully, positively and directly, it answers the same evasively and indirectly, so far as it does answer the same, and omits wholly to answer whether or not said master was a man of intemperate habits.

PAGE, McCUTCHEON, KNIGHT & OLNEY, and
IRA A. CAMPBELL and
E. C. HANFORD,
Proctors for Libellant.

Filed U. S. District Court, Western District of Washington. Jan. 26, 1911. R. M. Hopkins, Clerk. By Sam'l D. Bridges, Deputy. **[21]**

In the District Court of the United States for the Western District of Washington, Western Division.

IN ADMIRALTY—No. 858.

R. PETERSON,
Libellant,
vs.
GRAYS HARBOR TUG BOAT COMPANY,
Respondent.

Supplement Answers to Interrogatory No. 3 Propounded by the Libellant.

United States of America,
Western District of Washington,—ss.

Comes now E. O. McGlauflin and by leave of Court

first had, in answer to Interrogatory No. 3 propounded to respondent by libellant, he says:

That at the time the "Jane L. Stanford" was towed to sea by the tug "Cudahy" it was high tide on the Grays Harbor Bar.

E. O. McGLAUFLIN.

Subscribed and sworn to before me this 20th day of April, A. D. 1911.

[Seal of Notary] L. H. BREWER,
Notary Public in and for the State of Washington,
Residing at Hoquiam.

United States of America,
Western District of Washington,—ss.

M. M. Kueneke, being first duly sworn, upon oath deposes and says: That she is a resident of the county of Chehalis, State of Washington over the age of twenty-one years, and was at the time of making the service herein; that on the 20th day of April, [22] A. D. 1911, she served a copy of the within instrument, Supplement Answers to Interrogatory No. 3, Propounded by the Libellant, on the persons named therein, and in the manner hereinafter specified, to wit: By depositing in the United States post-office in the city of Hoquiam, Chehalis County, Washington, a true copy of the within instrument enclosed in a seal envelope with postage duly paid thereon addressed to Mr. E. C. Hanford, Burke Bldg., Seattle, Washington; that there is a daily mail service between Hoquiam and Seattle.

Dated at Hoquiam, Washington this 20th day of April, A. D. 1911.

M. M. KUENEKE.

Subscribed and sworn to before me this 20th day of April, A. D. 1911.

[Seal of Notary] L. H. BREWER,
Notary Public in and for the State of Washington,
Residing at Hoquiam, Washington.

Filed U. S. District Court, Western District of Washington. Apr. 21, 1911. R. M. Hopkins, Clerk. By Sam'l D. Bridges, Deputy. [23]

In the United States District Court for the Western District of Washington, Western Division (Now Southern Division.)

IN ADMIRALTY—No. 858.

R. PETERSON,

Libellant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Respondent.

Motion for Correction of Answer, etc.

Comes now the respondent and moves the Court for an order allowing it to correct certain manifest clerical errors in the last three lines of its answer, by interlineation in said answer, by interlining and amending the same as follows:

By changing the second word "or" in the third line from the last to the words "and not"; and in changing the word "and" in said line to the word "of," and by inserting between the word "respondent"

and the word "therefore" in the second line from the last, the words "this respondent," and inserting in the last line of said answer and immediately preceding the prayer, in the place of "the State of Washington," the words, "the United States of America," so that said lines shall read as follows:

> "And that if any loss accrued to the libellant, such loss accrued from dangers of the sea or the acts of God and not from the fault and error and neglect of this respondent and this respondent therefore claims exemption of the laws of the United States of America in such cases made and provided."

MORGAN & BREWER,
Proctors for Respondent. [24]

United States of America,
Western District of Washington,—ss.

F. L. Morgan, being first duly sworn, upon oath, deposes and says: That he is a resident of the State of Washington, and was over the age of twenty-one years on the 12th day of February, A. D. 1917, on which day he served the within Motion on the persons named therein and in the manner hereinafter specified, to wit: *On* C. H. Hanford, attorney of record for libellant, by depositing in the United States postoffice in the city of Hoquiam, Grays Harbor County, Wash., enclosed in a sealed envelope, properly addressed to C. H. Hanford, Colman Bldg., Seattle, Washington, with postage duly prepaid thereon, a true copy of the within motion for leave to amend answer; that there is a daily mail service

between the cities of Hoquiam, Washington, and Seattle, Washington.

Dated at Hoquiam, Washington, on this 13th day of February, A. D. 1917.

F. L. MORGAN.

Subscribed and sworn to before me this 13th day of February, A. D. 1917.

[Notarial Seal] M. M. KUENEKE,
Notary Public in and for the State of Washington,
Residing at Hoquiam.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 14, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [25]

Minutes of Court—March 2, 1917—Order Granting Motion for Correction of Answer.

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma, on the 2d day of March, 1917, the Honorable EDWARD E. CUSHMAN, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

No. 858.

R. PETERSEN,

vs.

GRAYS HARBOR TUG BOAT CO.

It is now ordered that respondent's motion, filed herein February 14, 1917, to amend its answer, be granted. * * * [26]

In the District Court of the United States, Western District of Washington, Southern Division.

IN ADMIRALTY—No. 858.

R. PETERSEN,

Libellant,

vs.

GRAY'S HARBOR TUG BOAT COMPANY,

Respondent.

Memorandum Decision.

Filed April 16, 1917.

PAGE, McCUTCHEON, KNIGHT, OLNEY and IRA A. CAMPBELL, E. C. HANFORD, for Libellant.

MORGAN & BREWER, for Respondent.

CUSHMAN, District Judge.

This suit is for damages against the owner of the tug "Cudahy" on account of the striking of the "Jane L. Stanford," spoken of hereafter as the "Stanford," on the Gray's Harbor bar, while being towed, outbound, by the tug, October 25, 1910. The fault alleged in the libel is that the tug's master was of intemperate habits and unfamiliar with the channel across the bar, which, it is alleged, he had never navigated before. Negligence is also charged

against him in crossing the bar when the breakers were too heavy and the depth of water too little.

The charge of intemperance is not sufficiently made out.

The channel followed on this occasion in crossing the bar had been used during, and since the preceding summer. The captain of the tug had towed vessels through it which were larger and [27] of equal draft to the "Stanford." The "Stanford" was the first tow taken over the bar by the captain of the tug since the preceding summer, probably since July, although the evidence is not clear.

For about twenty days before the accident to the "Stanford," there had been a storm with the wind from the south or southwest. This storm had been of sufficient severity to prevent towing over the bar during this time. The "Stanford" was loaded with lumber and had been towed down near the bar and had lain at anchor for about twenty days. Her draft so loaded was 19 feet, 10 inches forward and 20 feet, 2 inches aft.

On the morning of October 25th, the tug went out to afford her captain an opportunity to observe the bar, and as he returned the captain testifies that he reported to the captain of the "Stanford":

> "A. Well, there were several vessels bar bound there, ready to go out and there were three tugs or four but they were all down at the bar, looking at the bar and came back and I had been down once and looked at it and it didn't look bad at one end but the other it didn't look like a safe proposition and I went back

and waited for more water and went back, I wanted to satisfy myself and I went back and looked at it the second time and at that time the bar was passable as I thought and I went back and hooked onto the vessel. * * *

"Q. What was the condition of the bar when you went down in the morning to look at it?

"A. In the morning it was low tide and when we first looked at it it was ebbing, the last of the ebb when I looked at it the first time and the second time I looked at it it was flood, that makes quite a difference. [28]

"Q. How much of a difference was it breaking the first time?

"A. Just what we call the ebb tide, breaking like we would see on the river where there is a strong ebb tide running and the wind blowing the other way, that kind of a chuck on, and when the tide turns and the wind goes the same way that all disappears.

The captain of the "Stanford's" version of this is as follows:

"A. Spoke to him in the morning when he went down to the bar and came back by up stern of our vessel; I spoke to him again and asked him how the bar was; he told me that it didn't look very favorable, it was rather lumpy, but he says it might smoothen down this evening when the flood sets in.

"Q. Then you spoke to him again that day?

"A. Yes, he hung up to us about 1 o'clock; at

1 o'clock he went down to watch the bar again; he went down as far as, I can't say exactly, down to the end of the black buoy inside of the bar; Captain Johnson and Captain Ericson of the other two steamers were starting to tow the other two vessels out and he came back and he hollered to take—he hollered out to us to take his hawser and heave up."

Not over ten or fifteen minutes were necessary, or taken in actually crossing the bar. There is such a conflict in the evidence just how long before flood tide this towing was undertaken that it cannot be determined with reasonable certainty. Respondent's [29] evidence is to the effect that it was one hour before flood tide and that of libelant that it was two hours before.

Immediately preceding the "Cudahy" and her tow, two other of respondent's tugs took out tows of lighter draft without mishap. The master of one of these tugs testified:

"Q. Did you know that the "Cudahy" started out?

"A. Yes, sir.

"Q. You could see her? A. Yes, sir.

"Q. Did you signal to her with your whistle?

"A. I whistled to her; yes, sir.

"Q. What did you whistle for?

"A. Well, I whistled; I thought there was a swell on and they all signal to me lots of times when too much swell on, but I go on about my business.

Upon this point the master of the "Cudahy" says:

"Q. Suppose that a captain on one of the other tugs for the same company had seen the bar ahead of you and told you the bar was not suitable for towing out would you have followed his advice, his judgment * * *?

"A. If I was not able to see the bar I might have taken his signal but if I was able to see the bar I would have gone on my own judgment, I believe a man should use his own judgment about that.

The captain of the "Stanford" says:

"Q. Captain, what, if anything, occurred while you were crossing this bar?

"A. Well, fifteen minutes after we rounded that red channel *bouy* we struck upon bottom heavy, very heavy, aft and forward.

"Q. You say you struck ground, did you stop?

"A. No, a vessel don't stop, see you are going, are towing out and you see a heavy sea comes down and she never stops, she continues going; she struck down.

"Q. Did she strike first aft? [30]

"A. First aft and then forward. * * * "

The captain of the "Stanford" testifies that a few seconds before the soundings showed four and a half fathoms, 27 feet, which, without deduction, would have allowed over six feet of water under his vessel. This sounding was probably made before reaching the shallowest point on the bar and allowance should be made for the affect of the rise of

swells and of the sea on the slack lead line. It is also significant that, although it is shown that soundings were taken upon the tug, there is no evidence as to what they showed.

Captain Crowe, surveyor of the San Francisco Board of Underwriters, who examined the "Stanford" as soon as she was drydocked at Portland, after the accident, testified as to her condition, as follows:

> "A. I found the vessel, after putting her on the drydock, to have apparently hit with her heel on a sandy bottom; about 30 feet of the outer shoe and ten feet of the inner shoe on the heel were torn off the whole length, the whole after end of the vessel, extending to about one-third of her length; the vessel was all shaken in the seams; the butts along the bottom and all over the vessel were more or less started; the keel in several places on the places mentioned before, the pieces of shoe split off and in some places cut in deep enough to take off or scalp off the keel; in the vicinity of the foremast, underneath the foremast on the port side there were two pretty deep cuts and the planks bruised and cut in about two and a quarter inches deep. The keel right opposite that place was slightly damaged, and the shoe for a distance of about ten feet badly split up, and quite a portion of it gone. Right across the starboard side of the planks there was one bad bruise and a score of considerable length; these latter damages were fresh and had apparently been made by the vessel

going upon sharp rocks; also places damaged along the keel to about within 30 feet of her heel; the stern post was found set about one-fourth of an inch in the ship's counter; rudder not working true, that being swung, and the steam pump out of order. I think that comprises about the damage.

"Q. Did you make any statement, Captain, about the butts?

"A. The butts on the bottom and more or less all over the vessel every butt in a third of the length of the aft end of the vessel, every seam were shaken, and nearly all the others were more or less shaken; of course, [31] some may not have any visible bruise on it but the vessel was shaken all over."

The captain, engineer, fireman and deck-hand on the "Cudahy" testified that there was nothing observed by them to indicate that the "Stanford" struck on the bar; that she did not stop; nor did her mast or rigging shake, nor was any shock or jar felt upon the tug. The captain of the tug testifies to the use, at that time, of a towing machine which would pay out the line automatically. This would account for no shock being felt upon the tug. The engineer of the tug denies the use of such an automatic machine at that time, but both of these witnesses being for the respondent, the Court cannot conclude—in this condition of the testimony—with any degree of certainty that the shock would have been felt upon the tug.

It is shown that, while the "Stanford" was lying

inside the bar, several days before being towed out to sea, she went aground, with a southwest wind blowing. There is a conflict in the testimony concerning whether she was pounding, while aground, and, if so, to what extent, or for what length of time. She had to be pulled off by a tug.

It is contended by respondent that the injuries to the "Stanford" were caused by this grounding and that she did not strike upon the bar. Certain cuts upon the keel are described by Captain Crowe:

> "Underneath the foremast on the port side there were two pretty deep cuts and the planks bruised and cut in about two and a quarter inches deep."

There is evidence tending to show these cuts to have been five or six feet above the shoe. This injury being so high above the shoe, probably is accounted for by the fact that the "Stanford" was in the trough of the sea at the time she struck and was not on an even keel.

On account of the slight list of the "Stanford" at the time of her going aground inside the bar, it is difficult to see how these cuts upon the hull could have been caused by her lying upon [32] either of her anchors. No explanation is made of how, if, drifting before the wind, she dragged her anchors, she could possibly bring up and lie upon either of them.

Although respondent's witnesses testify to the "Stanford's" pounding on the sandy bottom while aground inside the bar, the log of the tug of respondent which pulled her off has the following entry:

"October 17th, 6 A. M., left Hoquiam for sea, towed boat 'Jane L. Stanford' from off *mud* to safe anchorage."

I am convinced that the "Stanford" struck upon the bar as claimed, not only from the positive testimony of the captain of the "Stanford," the mate and others upon her, which witnesses were, of course, in a better position to know whether she actually struck or not than those upon the tug (The Florence, 88 Fed. 302), but from the fact that it is very unlikely, if the "Stanford" was leaking from the grounding inside the bar, as badly as it is shown she was leaking after she crossed the bar, the captain would have permitted himself to be towed out to sea with his wife and five years old child.

The chief engineer on one of respondent's tugs, the "Traveler," testifies:

"Q. Do you recall furnishing them with an extraordinary supply of water?

"A. Yes, we gave them water twice, I think, I am pretty positive we gave them water twice.

"Q. What was said at that time about this matter of supplying them with this extraordinary amount of water, what was said to you as a reason for this extraordinary supply of water?

"A. When we pumped the water to them a sailor was standing there and I asked him what they were doing with all the water and he said—I asked them if they were washing their clothes with it and he said no they were running their steam pump.

"Q. Was that all that was said? [33]

"A. He said they were running the pump at the times when the towboats were not in sight.

* * *

"Q. Could you tell from observing the ship whether or not the steam pump was running?

"A. Well, I know they told me they didn't run it only when we were out of sight."

From the foregoing and the fact that, after the grounding inside the bar the crew of the "Stanford" mutinied and an exchange of crews with another vessel was effected, it is argued that she must have been leaking badly before being towed out.

The captain of the "Stanford" testifies:

"Q. It has also been testified here that the 'Jane L. Stanford' was consuming an extraordinary amount of water by reason of using her steam pumps, on account of leakage, is that a fact?

"A. The 'Jane L. Stanford's' steam pump had never been used for over a year until we got over the bar and found the water in it and when we started in with it we couldn't get it to take water and when we got to Portland we found the steam pump had broken off just below the decks.

"Q. Did you pump at all while you were in the harbor and waiting to go out to sea?

"A. If we had pumped at all we might have pumped the day in coming down from loading, we sometimes hold a little water for the reason we are loaded but I am sure we didn't leak a

quarter of an inch from the time we were at anchor down the harbor until we went over the bar.

"Q. Do you remember receiving water from a tugboat twice while down in the harbor?

"A. I remember receiving water, but whether it was once or twice or how many times I don't know. It was on account of having bad water down there and we had to drive the second anchor every other day and sometimes twice a day because it would get foul, if there is a heavy swell, and we would have to use more or less water and fuel and I think we got some fuel from them if I am not mistaken."

I do not believe that the water secured from the tug was for the steam pump. I reach this conclusion, not only from the positive testimony of the captain of the "Stanford"—that [34] the water was used for handling the anchors—but from the fact that the steam pump was found broken when it was needed immediately after she crossed the bar. The only reasonable way to account for the breaking of the steam pump—even accepting the argument that the water furnished was for pumping—is that it was injured by the "Stanford's" striking on the bar and it is reasonable to conclude that the same violence that caused the breaking of the steam pump occasioned the other damage, including the straining of the seams and butts.

When the tug signaled the "Stanford" to let go the line after getting out over the bar, the "Stanford" did not at once cast off the line, the captain delaying to investigate how much water she was tak-

ing after striking. The report not being alarming, he cast off and, calling the tug alongside, told the tug's captain that he had struck. Shortly after this it was found that she was leaking badly.

The libel alleges:

> "said master of respondent's said tug negligently and carelessly towed said barkentine to sea across said bar when the sea breakers on said bar were too heavy, and the depth of water on said bar too shallow to enable said barkentine to cross said bar in safety, and by reason thereof said barkentine struck on said bar and was badly damaged,"

and the answer admits:

> "This respondent admits that there was a heavy swell and sea breaking on said bar, but alleges that such sea at the time of taking the vessel in tow and up to the time the vessel reached the bar was not extraordinarily heavy or unusual, and was, in fact, safe for the purpose of towing out any vessel and particularly the 'Jane L. Stanford.' * * * "

There is evidence that there were three large rollers on the bar about the time the "Stanford" struck, her captain testifying:

> "What was the condition of the bar, that is, the condition of the water, the sea on the bar at that time?
>
> "A. At which time, the time when we were going out? [35]
>
> "Q. At the time you were going out?
>
> "A. Generally, the bar was lumpy, but just as

we struck there was three heavy rollers came in, three extra heavy swells came in.

"Q. Did they strike you?

"A. Well, we was right in them, had no chance to get out of them.

"Q. What was the wind?

"A. The wind was north, northwest, blowing a slight breeze. * * *

"Q. Then there were large heavy swells?

"A. Large heavy swells.

"Q. These large swells that came in just before you received this injury—you noticed how many big swells come in?

"A. Come in all the time.

"Q. These extraordinary large swells that you spoke of this morning—three extra heavy swells?

"A. That was when we started.

"Q. How long did you notice them before you struck if at all?

"A. We noticed them coming, them come probably every two, three or four minutes. * * *

"Q. Then—and so these three heavy swells you say were breaking three or four minutes before they struck you?

"A. Two or three minutes; I could not say exactly. * * *

"Q. The fact is that you did encounter three heavy swells right on the bar?

"A. Yes, very heavy swells. * * *

"Q. How many minutes did it take you, Captain, to pass through these three swells?

"A. I could not tell you; I didn't time it.

"Q. Well, about how many, five? A. No.

"Q. Two minutes?

"A. Took us probably two or three minutes. I couldn't say; I didn't take the time, but it was something like that."

I am unable to find anything of such an extraordinary character in these waves as not to have been reasonably anticipated, [36] in view of the long preceding storm and the well-known fact that, in ocean swells, there is a degree of regularity in the recurrence of swells considerably larger than the majority at the time prevailing.

I find that the captain of the tug was in fault in undertaking the tow at a time when it was entirely too rough upon the bar for the depth of water.

It is not unlikely that the towing was undertaken too long a time prior to flood tide, or the "Stanford" may have gotten out of the channel, but, if so, these facts are not made clearly to appear. The latter could not be ascertained as she only struck and passed on. If she had remained where she struck, it could have been shown whether she was out of the channel or not. But, whether the striking was caused by the one reason or the other, the captain of the tug was negligent. Grays Harbor was the home port of the tug. It was the captain's duty to know the depth of water and the channel, and the effect thereon of the sea running at the time.

The Margaret, 94 U. S. 494;

Gilchrist Trans. Co. v. Great Lakes T. Co., 237 Fed. 432 at 434;

Cons. Coal Co. v. Knickerbocker Steam Towage Co., 200 Fed. 840;

The Merrell, 200 Fed. 826, 836;
The Ft. George, 183 Fed. 731;
The George Hughes, 183 Fed. 211;
Winslow v. Thompson, 134 Fed. 546;
The Inca, 130 Fed. 36;
38 Cyc. 571;
28 Amer. & Eng. Encyc. 266, 7.

Nothing is shown to have existed or transpired but what the captain of the tug was bound to have known and anticipated; nor did the "Stanford" do anything to impede or interfere in any way with [37] the safe performance of the towage service nor is anything of the kind even suggested.

Under such circumstances, the rule that damage to the tow does not, ordinarily, raise a presumption against the tug,

The J. P. Donaldson, 167 U. S. 599; 603;
The Burlington, 137 U. S. 391,

does not obtain and the burden shifts to the respondent to free itself from blame.

Gilchrist Trans. Co. v. Great Lakes Towing Co., 237 Fed. 432, 434 (*Supra*);
Burr v. Knickerbocker Steam Towage Co., 132 Fed. 248;
Cons. Coal Co. v. Knickerbocker Steam Towage Co., 200 Fed. 840 (*Supra*);
The Merrell, 200 Fed. 826;
Hind, Rolph & Co. v. Port of Portland (Decision by Judge Wolverton of Portland, not yet reported).

It has not sustained that burden.

I find the striking to have been caused by the fault of the tug captain, as stated. The extent of the injuries and resulting damage are not questioned.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Apr. 16, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [38]

In the District Court of the United States, Western District of Washington, Southern Division.

IN ADMIRALTY—No. 858.

R. PETERSEN,

Libelant,

vs.

GRAYS HARBOR TUG BOAT COMPANY,

Respondent.

Memorandum Decision on Amount of Damages.

Filed October 11, 1917.

McCUTCHEN, OLNEY & WILLARD, IRA A. CAMPBELL, C. H. HANFORD, for Libelant.

MORGAN A. BREWER, for Respondent.

CUSHMAN, District Judge.

The pains with which this matter has been presented has saved the Court a great deal of labor.

Item.	Disallowed.	Allowed.
P. L. Cherry, disallowed upon concession of counsel for Libelant	$11.15	
James Keating, boat service at Astoria, allowed		$6.00

Item.	Disallowed.	Allowed.
A. N. Nelson, night watchman, allowed		18.50
Ross, Higgins & Co., meat bill, disallowed upon concession of counsel	9.15	
Captain Peterson, personal expenses, allowed		50.00
Brown & McCabe, use of engine, allowed		25.00
Anderson & Crowe, use of caulking tools, allowed		12.50
Amount allowed claims forwarded		$112.00

[39]

Amount of allowed claims forwarded		$112.00
Anderson and Nelson, work putting on deck-load		4.00
John Grant, commissions for procuring sailors		250.00
It is customary and necessary for ships in port to pay a commission to men who make a business of securing crews.		
Brown & McCabe, moving ship and other work		54.17
Brown & McCabe, amount of claim, $1936.35, stevedoring and coal, allowed except as to $88, which it		

Item.	Disallowed.	Allowed.
is conceded by counsel should be disallowed	88.00	1848.35
Port of Portland, storage and water		235.36
C. F. Beebe & Co., disallowed upon concession of counsel	.25	
Port of Portland		692.70
Port of Portland, moving the ship, disallowed upon concession of counsel	20.00	
Albert Crowe, survey and superintendence		90.00
Custom House fee		2.50
James Keating, boat service at Astoria		9.00
Vulcan Iron Works, materials and repairs		60.40
Geo. A. Nelson, brokerage		15.00
Telephone		1.40
Repairing lantern, disallowed upon concession of counsel	.50	
Telegram		3.87
Astoria Iron Works, repairing pump		7.75
Notary fee for marine protest		5.00
Hageman & Foard Co., ship chandlers, disallowed upon concession of counsel	255.50	
C. F. Beebe & Co., chart, disallowed upon concession of counsel	.25	
J. A. Stephens, watchman		15.00
Pay-roll of caulkers and mechanics.		453.00

Item.	Disallowed.	Allowed.
John Redding, returning tools to Portland		3.00
Amount of allowed claims forwarded		$3,862.50

[40]

Amount of allowed claims forwarded		$3,862.50
Ch. Johns, clearing wharf		30.80
Oregon Drydock Co., materials & repairs, $1161.85, allowed save as to $87.50, which is disallowed on concession of counsel	87.50	1074.35
Telegram, disallowed upon concession of counsel	.53	
A. Ekstrom and P. S. King		18.60
W. A. Pratt		42.50
Earle E. Drum, disallowed	222.69	
If this item had been paid, the fact of payment being an act against interest, would afford some evidence of the value, but I find no evidence regarding its value.		
Messenger		1.10
Ross, Higgins & Co., meat bill, disallowed upon concession of counsel	6.60	
Van Schuyver, whiskey, disallowed upon concession of counsel	3.70	

Item.	Disallowed.	Allowed.
Allen & Lewis, provisions, disallowed upon concession of counsel.....	151.54	
J. A. Stephens, repairs.....		28.95
John Grant, allotments of wages of new crew, disallowed.....	174.05	

This item of allotment of wages, or advances, made on the wages of the new crew, to John Grant, the agent who secured the crew, cannot be considered as a damage incurred because of the injury to the vessel.

The true damage accruing on account of the new crew would be the amount paid them on account of their services during the delay of the vessel in port during the making of repairs, damages on account of which have been claimed and are later allowed herein.

Amount allowed claims forwarded	$5058.80

[41]

Amount of allowed claims forwarded.....	$5058.80
American Marine Paint Co., copper paint.	

There is nothing to show that the paint charged for replaced any paint. During the time the

Item.	Disallowed.	Allowed.
vessel had been out of the dry-dock, the old paint may have been entirely worn off. This item for copper paint is disallowed.....	$160.00	
Smith, meat bill, disallowed upon concession of counsel.....	50.28	
John Redding, bringing sail, disallowed upon concession of counsel.....	3.50	
C. Karlson, 29 meals, disallowed upon concession of counsel.....	7.25	
J. Swanson, 2d mate, wages, disallowed upon concession of counsel.....	20.00	
Boston Packing Co., provisions, disallowed upon concessions of counsel.....	15.63	
Telegrams.....		7.50
Living expenses of master and crew during time of ship's detention..		212.65
Wages for time of detention.....		627.83
Expenses of general average adjustment:		
Printing report.$30.80		
Committee fee.. 30.00		
Adjuster's fee..100.00—$160.80,		
allowed.....		160.80
Total amount of allowed claims..		$6067.58

In damage to person or property, where there is no repair, the damage is truly unliquidated, at least

until the judicial determination of its amount, and another rule may obtain. But, in the foregoing items of damage allowed—being for money expended in restoring the ship and for expenses attendant upon the injury and delay, all of which have been paid—interest upon such expenditures for at least a reasonable length of time appears the better rule. [42]

The allowance of interest is, of course, in the court's discretion; but, as one is ordinarily entitled to interest upon expenditures on account of another, in the absence, as in the present case, of any extraordinary reason constituting a countervailing equity of some sort, such as have been made grounds in certain cases of the denial of interest, it should be allowed.

The Jeanie, 236 Fed. 463 at 473; (same case below), 225 Fed. 178;
The Bulgaria, 74 Fed. 898; Affirmed 83 Fed. 312;
The Oregon, 89 Fed. 520;
The Illinois, 84 Fed. 697;
The Sitka, 156 Fed. 427, Affirmed 159 Fed. 1023;
The J. G. Gilchrist, 173 Fed. 666; Affirmed 183 Fed. 105;
The Eagle Point, 136 Fed. 1010.

While this latter case was reversed upon another point, it was, impliedly, affirmed as to the point in question (142 Fed. 453).

In the present case substantially seven years have elapsed since the injury and commencement of suit. It is true that, in one of the reported cases of damage from collision, interest was allowed where there was

a delay of twelve years in bringing the cause to trial (The Celestial Empire, 11 Fed. 761), yet, in the absence of any explanation for the long delay, a certain amount of laches will be attributed to libelant. I consider that, while libelant is entitled to interest, yet it would be inequitable to allow such interest beyond the period of five years and, for that time, it is allowed at six per cent upon the total of the foregoing amounts ($6,067.58), amounting to $1,820.27. [43]

Demurrage will be allowed for the value of the use of the vessel during the delay occasioned by repairs, 52 days at $17.31 per day or $900.12. Loss on account of broken lumber, $153.77 and loss on account of the freight $76.28 will be allowed, but no interest will be allowed on the last mentioned items.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 11, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [44]

United States District Court, Western District of Washington, Southern Division.

No. 858.

R. PETERSEN,

Libelant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Respondent.

Decree.

This cause having been commenced by Robert Petersen, master of the barkentine "Jane L. Stanford," in behalf of the owners of said vessel and her cargo; and having proceeded to a final hearing, and the Court, after due consideration of the pleadings, proofs and arguments, having rendered and filed its decision in writing, and being now sufficiently advised in the premises, it is hereby:

ORDERED, ADJUDGED AND DECREED by the Court that, Robert Petersen, the libelant herein, do have and recover of and from the Grays Harbor Tug Boat Company, a corporation, for the use and benefit of the owners of said vessel and cargo, as damages for the injury alleged in the libel, including interest on the amount of the cash outlay caused by said injury, the sum of Nine Thousand and Eighteen Dollars ($9018.00), and interest thereon at the rate of six per cent per annum from this date until paid; and costs and disbursements taxed and allowed in the further sum of One Hundred and Fifty-one Dollars and Seventy cents ($151.70), and that execution issue therefor.

This decree granted and signed in open court this 19th [45] day of October, 1917.

EDWARD E. CUSHMAN,
Judge.

Exception asked by respondent and claimant and allowed.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington. Oct. 19, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[46]**

In the United States District Court for the Western District of Washington, Southern Division.

No. 858.

R. PETERSEN,

Libelant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Respondent.

Stipulation Re Testimony to be Included in Apostles on Appeal.

It is hereby stipulated and agreed by and between the libelant by his proctor, C. H. Hanford, and the respondent by its proctors, Morgan & Brewer, that the subjoined abstract contains all of the testimony introduced in said cause, heard and considered by the trial court, and material upon appeal to the Circuit Court of Appeals.

And it is stipulated that the said abstract may stand as and for a complete record of the testimony upon appeal.

The respondent, Grays Harbor Tug Boat Co., not admitting its liability for the payment of damages, stipulates that it makes no point as to the correctness of any of the several items of expense allowed,

except as to the item of Fifty ($50.00) Dollars expense money paid to Captain R. Peterson; and the item of $250.00 commission paid to John Grant; the item of $160.80 allowed as expense of a general average; and the item of interest for the period of five years allowed by the Court.

C. H. HANFORD,
Proctor for the Libelant.
MORGAN and BREWER,
Proctors for the Respondent. **[47]**

In the United States District Court for the Western District of Washington, Southern Division.

IN ADMIRALTY—No. 858.

R. PETERSEN,
Libelant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,
Respondent.

Testimony.

Abstract of Testimony, Witnesses for Libelant.

The following testimony on behalf of the parties hereto was received, heard and considered by the Court.

Deposition of R. Peterson, in His Own Behalf.

Master of barkentine, "Jane L. Stanford." Master of the "Jane L. Stanford" about a year and a half. Sailing in and out of Grays Harbor for about six years. Last out of Grays Harbor October 25th, 1910. (Page 2.)

Towed down from wharf to anchorage on the 5th of October. Had no contract for towage. We telephoned to them (Company) when we wanted to go outside. (Page 3.)

I telephoned to their office; they told me they would try to have a tugboat there for me. Net tonnage of the "Jane L. Stanford," 861 tons. Her draft 19 feet 10 inches forward and 20 feet 2 inches aft. (Page 4.)

We remained at anchorage close to twenty days. The cause of delay was simply on account of the tugboat captain didn't think it was fit weather to go out. [48]

Q. Well, you were waiting for suitable conditions on the bar were you not?

A. Waiting for the tugboat captain to heave up and take his tow-line; that is exactly what we were waiting for. * * * Well, when we towed down; after we go down inside to anchorage we have absolutely no say at what time we want to go out over the bar. When the tugboat comes down he tells us when to get ready, tells us when to heave up our anchor and that is all the control we have of when we are going out. (Page 5.) I was towed out on the 25th of October by tugboat "Cudahy." (Page 5.) Cap-

(Deposition of R. Peterson.)

tain Olseon was the captain. I spoke to him in the morning when he went down to the bar and came back to our vessel. He told me it did not look very favorable. At one o'clock he went down to watch the bar again. Captain Johnson and Captain Erickson of the other two steamers were starting to tow the other two vessels out, and he hollered out to us to take his hawser and heave up. We started to tow down at 2:30; we was abreast of the outer red channel *buy* No. 2 at 3:45. (Page 6.)

We went out the south channel. The south channel had been in use after I arrived in port and that was probably in use four or five weeks before I started out. Had never been through that channel before. In towing out we followed the tug. I have known Captain Olson quite a few years. He has been employed by the Grays Harbor Tug Boat Co. off and on for the last few years. (Page 7.)

He was employed on the dredger working in the harbor while I was loading. Captain Olson told me not to set any square sail until we got out clear of the head winds. I had no understanding with him as to the channel to be followed out. Two other vessels towed out ahead of us. They drew less water by a couple of [49] feet. I should judge one of these vessels was five or six miles ahead of us, and the other was about a couple of miles ahead of me when this accident happened.

After rounding the red channel buoy No. 2 I should judge we took a course, south half west, magnetic. (Page 8.) The tugboat zigzagged a lit-

(Deposition of R. Peterson.)

tle. Tugboats always do a little. Impossible to keep a straight course going out to sea. As far as appearance went the vessels ahead of me got across the bar safely. Fifteen minutes after we rounded the red channel buoy we struck bottom heavy, very heavy, aft and forward. No, a vessel don't stop. I didn't stop. No, a vessel don't stop. You see a heavy sea comes down and she never stops, she continues going; she struck down. She struck first aft and then forward; it was about two hours before high water, flood tide. I sounded going out. I had a man sounding. (Page 9.)

Q. What did the readings show at the time you struck?

A. The report he gave me a few seconds before she struck was four fathoms and a half, but of course we always allow a few feet, you know, for sea.

* * *

Q. When did you take the reading on a rising sea or otherwise?

A. We always allow from two to four feet of water; always count on that, because if standing sounding we always leave a slack line in a heavy sea and we never count on that coming within two to four or five feet of water, on our line. (Page 10.)

The report he gave me before she struck was four fathoms and a half. If we had four and a half fathoms at that time we should have six feet ten inches clear. The bar generally was rough but just as we struck there was three heavy rollers came in, three extra heavy swells came in. We was right in

(Deposition of R. Peterson.)

them; had no chance to get out of them. The wind was north, northwest. Immediately prior [50] to the striking the sounding was the least water he reported. We had seven, but inside we have more water. She shoaled water he reported to me going out. The tug let go fifteen minutes after striking; that is, he whistled to let go fifteen minutes after but I refused to let go his line. (Page 10.) Yes, the first officer sounded. He reported the same usual eight inches in it. That is what we have in the vessel nearly all the time. I let go then. I told the mate to let go and sung out to the captain to come alongside. I told him to report to the company that we had struck very heavy going out; that so far we was not making any water. I sounded twenty minutes after. We found twenty inches of water. Yes, after we started to go down we set the mizzen and mainsail, inner jib and foretop stay-sail. That was the only sails set until we had passed that red channel buoy and then we went south. When we set the lower topsail, and when we were beginning to loosen the upper topsail the vessel struck. (Page 11.)

Q. After sounding the second time, Captain, with a report of twenty inches of water, what did you do?

A. Well, at that time we had set all the sails; that is a majority of the sails; we had all our sails set outside of the skysail; I ordered all the small sails clued up and made fast.

After they were fast I sent all hands to the pumps, everybody, mate and all hands outside of the man on the lookout. We worked two pumps. I could just

(Deposition of R. Peterson.)

hold her by working both pumps; we had then 42 inches in her. * * * That same evening, at 11 P. M., I set the ship's course for the Columbia River Light Ship. At 11 o'clock the next morning the tug "Oneonda" picked us up and towed the ship to Astoria; she was anchored there a day and a half and then towed to St. Johns and anchored; the next day she was put into the wharf of the port of Portland drydock and began to discharge lumber. * * * (P. 11–12.) **[51]**

The ship went on the Oregon drydock. I examined her on the drydock. Part of the shoe aft and forward was gone; part of the keel injured by striking on the rocky bottom; all the butts and all seams aft from keel to coverboard were started, and quite a number of seams fore and aft on the whole length of the vessel had started. The rudder gudgeons were slightly twisted. We found the steam pipe from the pump had broken off just below the deck. Some of the planks forward were cut like a sharp ax had come down on them; we had to put pieces in quite a few of them. The butts were started; what we mean by starting is where two planks are joined, or two planks meet and are cemented part of the cement had fallen out and the oakum worked out. The injury to the keel was all along in different places about two feet some places, a foot in some places or eight inches; we had to put pieces in.

Captain Albert Crowe examined the vessel on the drydock. He was there in the interest of the underwriters. (Pages 13–14.)

(Deposition of R. Peterson.)

Referring to conditions on the bar: Well, I never towed out with as rough a bar with a sailing vessel; I have gone out with a steamer when it was as rough; but never with a tugboat when it was so rough. Never sailed out when it was as rough as it was, with a sailing vessel. (Page 15.)

On cross-examination he said:

I have been sailing out of Grays Harbor six years or a little over. I took out the barkentine, "Newsboy" and "Fairoaks," and the vessel I have got now, the "Jane L. Stanford." (Page 19.)

On pages 18 and 19 of the set of depositions taken by H. G. Marsh, United States Commissioner at Portland, Captain R. Peterson, a witness in his own behalf, testified as to the items of expense for repairing the "Jane L. Stanford" as follows: [52]

Paid to Brown & McCabe brokerage fees for entering and looking after the vessel ....$	15.00
For pilot's launch hire at Astoria	9.00
For watchman at St. Johns, looking after the lumber cargo while the vessel was in drydock	15.00
For labor at St. Johns moving pipe and laying cargo down	30.80
Paid Joseph Redding for launch hire....	3.00
Paid calkers and helpers	453.00
Paid Oregon Drydock Company for labor and dockage	1,161.85
Paid the Vulcan Iron Works	60.40
Paid Hagerman & Ford Company	255.50

(Deposition of R. Peterson.)

One chart of Grays Harbor	.25
Special messenger to St. Johns	1.10
Towage in and out from Astoria to Portland	697.20
Storage for lumber	225.00
Stevedoring, approximately	1,800.00
Coal, fuel discharging cargo	58.50
Stevedores for hauling ship and help, etc.	44.12
Exchange on draft sent to Brown & McCabe	8.50
Telegrams to San Francisco Underwriters	5.70

That is all the bills at the present time but that is now all the bills completed. I will have to pay bills for getting my sailors and I will have to pay wages and bills for our stores and everything else.

I was anchored in the lower harbor about twenty days. (Page 20.) Probably seven miles from the bar. During the time I lay there I went aground once. I guess it was about ten days before **[53]** we went out. I went aground on the north spit, on the north side of the channel. I think I stayed aground about five hours. I certainly knew when we went aground. I certainly was awake; whenever anything like that happens I was up. She went aground on the north side of the channel. She just went aground down on the Sand Island near there. No, she went to the southern of Sand Island. Certainly, yes, sir; I was awake when she went aground. (Page 21.) She did not bump. It was blowing

(Deposition of R. Peterson.)

when she went aground. Wind was south, southwest. It was what we call a blow. Went aground in the night between twelve and one o'clock somewhere as near as I can say. She never bumped. Nobody knowed she was aground outside of sounding with *with* the lead and line. I got off in the morning when the tug came down. The tugboat put a line to us and pulled us off. Captain Johnson was pulling first and then I requested him to let go that I could get away and then Captain Sanborn finished the job. Captain Johnson had the "Daring." The "Daring" was a powerful tug. He pulled well, I should judge between five and ten minutes, altogether. (Page 22.) I wish he hadn't pulled at all. I was only sorry that I got him to pull. Because when Sanborn came along he could do the pulling. I only wanted to hold on until I got my anchors clear and she would have floated out as soon as high water came. Sanborn pulled me off. I could have floated out at high water but not at low water. I laid there something like ten days after that. On the day on which we actually went over the bar Captain Olsen came along. No, he didn't say it was too rough; the first thing, he went down to the bar and then he came back and said it didn't look very promising, or very good, but it might smoothen when the flood sets in; that was the words he used. That was in the morning. He tied up a line there until about one o'clock. Then he went down to watch the bar again and then came back. He was down about to the inner black buoy when

(Deposition of R. Peterson.)

Johnson came down towing the ("F. J. Wood") and the "Printer" started towing the barkentine "Americana." (Page 23.) One anchored I [54] should judge half a mile and the other three or four miles from me. They all started; no he didn't start out with me. He, Olson, did not start out with me; he was away down and then came back. He came back; he says—I says, "You are not going to take me out to sea; you are going to take one of the small ones, the 'Fred J. Woods' or the 'Americana.'" He says, "No, you heave up and grab my hawser." No, I didn't want him to take me because he was too small for that tow. He had the "Cudahy." Of course he took me. As you go down the bay you are not able to see the bar. Unable to see at all until you get down to the outer red channel buoy No. 2. I can see its condition if I climb up the rigging, but I can't do it standing looking off toward the bar. I certainly did watch the bar. I had my glasses out as soon as I was able to see it. Yes, when I got so I could see the bar it was very lumpy. (Page 24.) I mean when a very big swell comes in, when it breaks off the bar, when it breaks then I call it very rough; I could not say this bar was breaking, but it was very lumpy; large, heavy swells. Big swells come in all the time. These three extraordinary heavy swells, that was when we struck. I notices them coming. They come probably every two, three or four minutes. I would not say the distance, but it was a few minutes before. You bet they were breaking. These three heavy swells were breaking

(Deposition of R. Peterson.)
two or three minutes before they struck us; I could not say exactly. When we got over the bar there was swells as there generally is in the winter-time; was not choppy; was not breaking outside. (Page 25.) It is never breaking out in deep water; if it is there is something doing. No, the swells outside were not especially heavy, there was swells that we generally have in the winter time from the southwest; the wind was north northwest. It was what I call a full sail breeze. I did not suffer any from encountering any heavy gales. I suffered from want of sleep. The vessel bumped pretty hard. The hardest I ever bumped. I say she bumped heavy fore and aft once. (Page 26.)

I told them not to let go the tow-line until we found out if we **[55]** were leaking water. He, the mate, came back and reported eight inches of water. I thought at that time the vessel was safe enough to proceed with. Johnson went out the same way I did. Yes, sir; he had no trouble that I know of. Erickson went out with his tow just ahead. He was a couple of miles ahead of me. So far as I know he had no trouble. If I had been on the bar five or ten or fifteen minutes earlier it is hard for me to tell whether I would have had any trouble. I could not say anything about it. Q. "Would you have had any trouble if you had not encountered those three rollers that you spoke of?" A. "I can't tell; it is impossible for me to tell what would have happened." (Page 27.) You know "if" is a hard thing to say. The fact is we did encounter three

(Deposition of R. Peterson.)

heavy swells right on the bar. I could not say how long it took to cross over this bar. I have never been over the bar the way we went before. The other way we used to go out that is at least twice as long a distance, we were towed out over shoal water. This time we didn't have shoal water only two minutes after he had bumped us; we had deep water again and I could not say any actual time; I could not say anything about the bar because there is absolutely no buoys or anything I could tell the bar by. Had soundings of considerable depth of water just a minute or two before we started over the bar. A couple of minutes after we had considerable deep water. Any seafaring person always notices that three swells come along together, close together, following each other. Yes, three big rollers came in one after another. I don't think a vessel could be long enough to ride all of them at one time. (Page 28.) My vessel only rode one at a time. We caught the swells almost a beam. Swells usually come from the northwest. We were in three of them before we finished; three of them had to pass us. We were in the trough of each one of them. It would be possible for a tugboat to turn around when on the outer edge of the red channel buoy. Could not turn around outside on leaving the red channel buoy, the outer red channel buoy. After you pass the red [56] channel buoy you might say you start in on the bar; that is a new channel according to the way we was towed. From the time we was at the red channel buoy and turned around

(Deposition of R. Peterson.)

until the time he let go it took us about half an hour. (Page 29.) It took us probably two or three minutes to pass through these three swells. I could not say. I didn't take the time. I had a man named Steel heaving lead. I was on top of the deck load all of the time. Sometimes amidship, sometimes forepart, always where I could talk to the men at the wheel and hear what they said when they was heaving lead. Before we struck we got four and one-half fathoms. (Page 30.) I am not positive what we got the next time. The tug took us over the bar. I should judge about fifteen minutes after we struck he blew his whistle to let go. No, I didn't have much sail set. "I had the mainsail, mizzen, inner job, foretop staysail and forelower topsail; that is the sail we had on." That would not be half the canvas, I don't think. (Page 31.)

The "Jane L. Stanford" was built in Eureka, California, in 1891 or 1892. She was on the drydock at San Francisco, a year ago last June. (Page 36.)

I was not her master then. I don't know anything about when that channel formed excepting what somebody told me. I have it from very good authority, the tugboat captains; they know more about that than anybody else. They come in and out every day. They are supposed to know all there is to know about it. (Page 37.)

On redirect examination he said:

Yes, I say I went aground ten days before crossing the [57] bar and while at anchor. (Page 40.)

(Deposition of R. Peterson.)

Oh, I guess it was kind of sandy bottom as far as I know; it is all sandy, whatever comes out of the water shows nothing but a soft muddy sand. Nobody knowed that she was aground. You can't call it perfectly smooth with quite a breeze, but you can't get any sea in there; a little choppy that is all. She dragged aground with both anchors down. (Page 41.)

"Now, Captain, you say that the keel in many places was dented in?" Yes, pieces taken out. To the best of my knowledge she was last in drydock a year ago last June. She was in first-class condition. I have never been in my life on a vessel that was more seaworthy or stauncher vessel than the "Jane L. Stanford." She is noted for that on the coast. She was due for the drydock for cleaning and painting; no repairs whatsoever. (Page 42.)

On recross-examination he said:

When I first towed down they anchored me first at the black tank. No, sir; I didn't object to being anchored at the black tank. No, sir; I requested them to put me down closer to the bar where I would be safe and where I would be handy for them to take me *me* out; that is just as much to oblige them as me because they like it that way; the tugboat captains like that. The black tank is about one-half way further up. Not any safer than the others. They anchor just as many down there as they do up there; in fact we all anchor down there. I could not tell you where the "Jane L. Stanford" has been; I have been in these ports—Sydney, Newcastle and Adelaide.

(Deposition of R. Peterson.)

Do not know whether she has ever been on the rocks there. (Page 43.)

I examined her bottom on the drydock at Portland. Never [58] saw her keel before that time. Never saw condition of her shoes before that time. Only the report the captain gave me when I took charge of the vessel. Did not see condition of her rudder or gudgeons. Do not have to see them. Don't have to see that.

Q. You never examined her seams below the waterline until she was on the drydock at Portland?

A. Well, I have laid with that vessel five months and the vessel has never taken in a half inch of water.

Deposition of Captain R. Peterson—November 9, 1914.

Direct Examination.

If she pounded (when she was on the sandspit) then I don't know it because we absolutely didn't know we were aground; I didn't know it before two hours after she was aground on the spit and the mate came down and he told me and I said, "Why didn't you call me when she got aground?" and, he said "We couldn't do anything." I was on deck at the time the tug towed us off. No, there wasn't any pounding whatsoever, she jared a little bit when he was swinging her off; not sufficient to do any damage. (Page 126.)

No, no heavy swell that I noticed. The "Jane L. Stanford's" steam pump had never been used for over a year, until we got over the bar and found the

(Deposition of R. Peterson.)

water in it and when we started in with it we couldn't get it to take water and when we got to Portland we found the steam pump had broken off just below the decks. If we had pumped at all we might have pumped the day in coming down from loading, we sometimes hold a little water for the reason we are loaded but I am sure we didn't leak a quarter of an inch from the time we were at anchor down the harbor until we went over [59] the bar. I remember receiving water but whether it was once or twice or how many times I don't know. It was on account of having bad water down there and we had to drive the second anchor every other day and sometimes twice a day because it would get foul, if there is a heavy swell, and we would have to use more or less water and fuel and I think we got some fuel from them if I am not mistaken. (Page 127.) No, sir; the vessel did not at any time while we were on the spit lay on her anchors. We could not drift on to them. As near as I can recollect after the "Daring" left the tugboat (after pulling off the sandspit) hung on to us for an hour or so, I can't say, it might have been two hours but I couldn't say, it is so long ago I can't remember but I am positive it was not near twelve hours, I am positive it was nearer six than twelve hours. That was not pulling us off the bar. No, sir; he held on to us, when we were laying aground, one chain was leading right out and the other was leading ahead and we tried to heave one in and it tore the bow-string, the lower bow-string and we had some little trouble with the anchors. (Page

(Deposition of R. Peterson.)

128.) The tug had to hold on to us until we got our anchor in. No, sir, the anchors were not at any time under the vessel; the anchors could not very well float up underneath the vessel and then on the sandbank.

Q. "There has been some testimony here in regard to trouble with your crew, a mutiny in fact, did any trouble with your crew relate to the fact that you had gone aground on the bar?"

A. "Well, perhaps it has; it was after we had been aground; I don't remember when it was whether it was the same day or the next morning; I wouldn't say; it might have [60] been in the evening. The cook gave them a meal and they all refused to eat it; they all said it wasn't fit to eat and they wouldn't do any more work aboard the vessel and this thing happened after we were off; they didn't refuse when we were on the spit; they didn't refuse to work while we were on the spit or before we got on; this was all after." I locked them up and I sent for the United States Shipping Commissioner, which I have got to do, and we arranged that they were to take our men to another vessel and we were to work the crew from the other vessel. There were two men on our vessel that remained aboard. (Page 129.)

There was no fright or excitement on the part of the crew. Nothing to frighten them. We had no damage at the spit, if we had had any damage I wouldn't have gone to sea that way, I wouldn't have taken my family and the crew out and risk getting drowned if there was any danger. Yes, I would know if she had leaked in the harbor before we got

(Deposition of R. Peterson.)

out and if she had taken a quarter of an inch of water. (Page 130.) It was a week at least after she grounded before we went to sea. That was the first time the steam pump had been tried for over a year. I have heard the testimony of the witnesses to the effect that the bar was smooth. I don't think it was smooth. I don't think anybody else thought it was smooth. (Page 131.)

On cross-examination he said:

She went aground but she didn't thump on the sandspit on Sand Island. The second mate kept watch, the mate and second mate, and they came down and reported to me, after about two hours he came and told me. He said she had been aground for an hour and a half, and I said, "Why didn't you call me right off?" [61] and I said "You have orders to call me as soon as she started dragging." Yes, sir; I was asleep when he came and reported to me.

Q. "Why did you testify at Portland under oath before the Commissioner there that when you went aground you were wide awake, why did you say that, that you were awake?" I certainly was awake when anything like that happens. As far as I remember now I was asleep, as far as I can remember, this is a long time ago you must remember. (Page 132.) If I say it there, that was at the time it happened and I must have been awake. I was awake when she went aground. Certainly, yes, sir. Yes, sir, I mean then that I was awake.

(Deposition of R. Peterson.)

Redirect Examination.

If she thumped I would know it at once. I don't just remember what time it was. After that I was up all the time while she was aground. (Page 133.) Well will say I was on deck all the time as far as I can remember but I thought I was below at the time asleep but if I gave that testimony at that time I certainly was there.

Recross-examination.

It was not calm by a long ways. I would consider it was blowing. There may have been a swell but there is never any sea. [62]

Deposition of O. F. Thomsen, on Behalf of Libelant.

Second mate of the "Jane L. Stanford" during the month of October, 1910. Been at sea twenty-two years. Been with "Jane L. Stanford" since October 5, 1910. Was second mate on the "Stanford" at the time she crossed the bar. The "John Cudahy" was towing. The only thing occurred, of course, was the time we struck. We struck, yes, about ten minutes or so before the tug would let us go.

Q. "What caused you to strike?"

A. "The only thing I can say was the heavy swells rolling in over the bar at the time."

Well, they were not what you could call heavy seas but heavy swells; just the time it struck I could not exactly swear to it. (Page 45.)

We struck with force; just stopped right dead, stopped just as if had come up against a stone wall; she stuck pretty hard; I was standing on the deck

(Deposition of O. F. Thomsen.)

load just abaft of the forward house. I had my feet on the lashings and the lashings just collapsed and came up again just like fiddle-strings. No, sir; I could not say what the soundings showed; there was a man in the chain heaving lead, but I didn't take any notice of how much water he was getting. Yes, I made soundings; it was twenty minutes after we let the hawser go. Got twenty inches of water. We lay at anchorage twenty-three days before towing out across the bar.

Q. "Do you know what caused your delay at anchorage?"

A. "Well, they claimed it was too rough for us to cross; that is the only reason I know. There was some ships went out the time we laid there but all drew less water than we did. The Tugboat people claimed it was too rough to go out; they were supposed to take us out; they come up every day and [63] looked at the bar and they thought in their estimation it was too rough to take us out, and left us there."

On cross-examination he said:

I never was out of Grays Harbor before. I signed on the October 5th, at Tacoma. (Page 46.) We laid down inside of the bar for 23 days. During that time the tugboat people told us it was too rough to go out; Yes, that is the reason we were delayed. No, I didn't hear all of the conversation. I heard several times the captain asked, I don't know the man's name on the "Daring," asked about going out; well, I could not say exactly how many times I heard it,

(Deposition of O. F. Thomsen.)

but generally when those boats go by the captain generally hollered to them, to the captain of the tugboats, and they say, "nothing doing" say it was too rough. He, the captain only asked if there was any chance for us to go out. I heard them talking it over once the day they took the ——— and "Americana," I think; they always seemed to think it was better to wait and go out safe than to take any chances. Went out October 28th, and while crossing the bar, we struck. (Page 47.) There was no heavy sea at that time, just swells, heavy swells; that is my opinion. It is very hard for us to tell it from inside; it always looks like swelling bar out there; when we crossed there was heavy swells rolling there all the time. I could not tell but heavy swells come at the time we struck. I was standing at the deck load at the time we struck; just *d*oing down to turn the steam off the winch. I know that just at that time several heavy swells came in. Yes, came in, and that we struck. I'll tell you exactly how it felt; just felt that you would take the ship and drop her up against something hard and felt to me she just stopped there, just [64] stopped short. (Page 48.) Yes, it bumped on the bottom. Yes, sir; she came right up again on this swell. She only hit once. She bumped full length; she struck forward, that is the way it felt to me, but the other people there said she struck aft; so she must have struck pretty hard right along. No, sir; I can't say I observed any swells before that reached the ship. I did not observe any. None of the lashings parted that I spoke of. Simply gave

(Deposition of O. F. Thomsen.)

and then tightened up again. At times she pitched before these swells came in she pitched more. (Page 49.) I never towed out over this harbor before. The first officer's name was McDonald. I think he is in Aberdeen. I think he left the ship on November first.

Redirect Examination.

We went behind the tugboat all the time; that is in her wake.

Deposition of Fred Johnson, for Libelant.

I signed on the "Jane L. Stanford" on October 5th. I was twenty-one days on board until the day we pulled out from Grays Harbor. We passed out from Grays Harbor under tow. We had five sails set. I could not tell the name of the tug there; I had never been in Grays Harbor before in my life. The condition of the sea on the bar at the time we crossed was quite rough, choppy like, breakers. (Page 51.) I was up on the fore topsail yard. Well, I know what happened, I went first down the yard when she struck and I caught hold of one of the butt-lines. The vessel struck on the sea. Yes, sir; well, so hard as anything could; same [65] as if you jumped from that window hard on the street on the sidewalk. The vessel stopped. Well, I could not tell you exactly how long she stopped; she just stopped dead when she struck. The next wave came and lifted her out and we went on then. I do not know what made her strike. The tug let go the line just when she struck; the captain was standing out and sang out,

(Deposition of Fred Johnson.)

"Don't let go." "Don't let go." Me and another fellow was up loft loosening the sails when she struck. Pretty good wind blowing; pretty stiff breeze. We started; Mr. McDonald went down to sound it and in fifteen minutes Mr. Thompson went down to sound again. I don't know what was in there. (Page 52.) How much water was in there; sounded the pumps. I never crossed that bar before. I do not know why we waited twenty-one days before we went out. (Page 53.)

On cross-examination he said:

Been going sea, deep water, for eleven years. First trip out of Grays Harbor. I am an able-bodied seaman. I was up loft. I looked out over the bar as we went out. The sea was choppy, breaking like on the bar. Quite a heavy sea all around. When we got out over the bar the sea was not choppy; heavy rolling sea; heavy swells; good stiff breeze. (Page 54.) I could not tell the direction of the wind. I never noticed three unusual swells just about the time we struck. Loosening up the upper topsail. Bumped once, that is all I noticed. I was not looking down to see whether any unusual swells were coming in. No, sir, I could not say I saw unusual swells. Struck aft. She was pitching before she struck. We were lying down inside the bar twenty-one days. (Page 55.) We went aground once. It was on a Sunday night; [66] we had two anchors down when she dragged. Dragged up on the Beach; low tide. Well, on Monday morning in about two hours the tide came up again. Tow boats got us off. It was all of a week

(Deposition of Fred Johnson.)

before we went out. Tugboat pulled us off Monday morning. (Page 56.) There was a storm that Sunday night; blowing pretty good from the southwest, I believe. We went aground on the side of the channel opposite Westport, on the north side. She was laying over that morning when we turned out.

Redirect Examination.

I discovered we were aground in the morning when we turned out. (Page 57.)

The tug had no trouble pulling us off. She swung around once and then it got her off. It took about a couple of hours.

Recross-examination.

We had two anchors out; two bow anchors; she went sidewise.

Deposition of Albert H. Crowe, for Libelant.

Captain ALBERT CROWE, residing at Portland; occupation, agent and surveyor of the Marine Underwriters for eight years past, testified as follows:

I examined the "Jane L. Stanford." (Page 59.)

I found the vessel, after putting her on the drydock, to have apparently hit with her heel on a sandy bottom; about thirty feet of the outer shoe and ten feet of the inner shoe on the heel were torn off the whole length, the whole after end of the vessel, extending to about *to about* one-third of her **[67]** length. The vessel was all shaken in the seams (page 61); the butts along the bottom and all over the vessel were more or less started; the keel in several places on the places mentioned before, the pieces of shoe split off

(Deposition of Albert H. Crowe.)

and in some places cut in deep enough to take off or scalp off the keel; in the vicinity of the foremast, underneath the foremast on the port side there were two pretty deep cuts and the planks bruised and cut in two and a quarter inches deep. The keel right opposite that place was slightly damaged; and the shoe for a distance of about ten feet badly split up; right across the starboard side of the planks there was one bad bruise and a score of considerable length; these latter damages were fresh and had apparently been made by the vessel going upon sharp rocks; also places damaged along the keel to about within thirty feet of her heel; the stern post was found set about one-fourth of an inch in the ship's counter; rudder not working true; steam pumps out order; I think that comprises about the damage. (Page 62.)

Deposition of Albert Crowe, for Libelant.

ALBERT CROWE, a witness for the libelant, testified on page 64 of the same set of depositions as follows:

Before the injuries the "Jane L. Stanford" has been a specially strong built vessel, strong and in splendid condition. One of the best kept vessels that I can go aboard in a year.

The injuries enumerated were all in my opinion due to the accident on the Grays Harbor bar.

Q. Can you state the cost of making these repairs?

A. I have O. K.'d bills, I think, to the extent of

(Deposition of Albert H. Crowe.)

about $5,200. I haven't kept an exact record of them. **[68]**

On cross-examination he said:

The height of the keel is about twenty-six inches; up to the garboard strake. (Page 67.)

There was some injury to the planking on each side of the keel. I think under the foremast the floor of the vessel is pretty flat. I think it would be about three feet up on the plank; three feet, two inches. So that would be up about three feet; from the lower level of the keel; about three feet and two inches, and that was on the port side; on the starboard side it was just little bit higher. If the keel was resting on the bottom these injuries would be three feet above the bottom. Undoubtedly these injuries were made by sharp rocks on each side. I do not think the other injuries to the keel were made by sharp rocks. No, sir; on the hull they were apparently made by the sand; looked as if whole of vessel just grounded on the sand; I would take it that way. The keel is protected on the lower part by a shoe. This vessel had a four-inch and three-inch shoe. (Page 68.) a double shoe; one on top of the other; seven inches of shoe and the keel was about twenty-six inches; the keel and the shoe was about twenty-six inches; it is not a serious matter to replace a shoe; the shoe was injured up forward of the foremast; it took in two or three cuts when it was repaired by putting in one to cover that length in about three other places, grainy places we call them, sort of split in the casing of the keel; we took and put in new ones

(Deposition of Albert H. Crowe.)

and renewed the whole length in some places; only two or three, and in three or four places we patched them; on the after end of the vessel we put in about ten feet in one length. That is the shoe; the keel itself was very little damaged. This shoe, or rather these shoes were for the purpose of protecting **[69]** the keel from injury. I never saw a double one before. Been born in the shipbuilding business, but I never saw a double shoe until I saw it on this vessel. (Page 69.)

Put over bottom of keel to protect the keel. About all the damage that we repaired was to replace these shoes and make a couple or three slight repairs to the keel, planking and rudder. We grave-pieced the planking where it was cut on the rocks; about four places on the keel and three places on the planking. I am not positive; I really don't remember whether the starboard one was repaired with grave piece or smoothened out. (Page 70.)

Deposition of Mrs. Peterson, for Libelant.

Was aboard the "Stanford" in October, 1911. "Stanford" went aground at night; did not know any difference; no pounding. (Page 73.) Captain Johnson came and pulled us off. I remember the ship striking on the bar. (Page 74.)

On cross-examination:

Did not know when vessel went on spit; think it blew a little; we got off early in the morning; it was after that, that the mutiny took place. Practically all the crew left; yes, we got a new crew; I saw the

(Deposition of Mrs. Peterson.)

planks that were marked up; I think they were on the starboard quarter; the marks on the planking were up on the round; I wasn't down on the drydock. I was up on the side where we get aboard and saw it. (Page 79.) I could see the mark there where you looked down over the side. Well, I couldn't tell really how high above the keel these marks were; they might have been above my head, if I was standing alongside. Yes, or just about level. **[70]**

Testimony of Respondent.

Testimony of Captain Chris Olson, for Respondent.

I live at Tokeland, Pacific County, Washington.

I have been going to sea since 1877.

I have been master 27 years.

I have been master of a boat 27 years. (Page 3.)

I towed in and out of Grays Harbor continuously for 20 years, and off and on for about 7 years.

I was first employed by Preston & McKinnon on the tug "J. M. Coleman."

I began towing in and out in 1887, and I towed over Grays Harbor bar from 1887 to 1907, twenty years.

I towed out several hundred vessels anyway. (Page 4.)

I was in charge of the tug "Astoria" for 9 years.

I was on the "Cudahee," and the "Daring," the "Traveler," and the "Printer," but I can't tell you how long I was on any one of them.

During all that time I had a master's license, and I still have a master's license.

I recall the time that "Jane L. Stanford" was

(Testimony of Captain Chris Olson.)

towed to sea some four years ago, in 1910. (Page 5.)

Well, there were several vessels bound down there ready to go out, and there were 3 tugs or 4, but they were all down looking at the bar and came back. And I had been down once and looked at it, and it did not look bad at one end, but the other end did not look like a safe proposition and I went back and waited for more water, and went back.

I wanted to satisfy myself, and I went back and looked at it the second time and at that time the bar was passable as I [71] thought, and I turned back and hooked onto the vessel.

I went down to what they call the narrows and looked at it, and from there I could tell what the bar was.

I returned and hooked on to the "Stanford" and towed her to sea.

I cannot tell you what the other tugs were doing, because I only could go on my own judgment.

I followed the channel as near as I possibly could, because you are working out on a range and what we call the lone tree down there, and the red buoy and with these two lines it was the best place at that time, that particular range.

That was the best channel at that time, although it depends a good deal upon the tide. But this time it was the best place for the reason that there was a westerly swell on and it makes it easier, but if there was a southerly wind it would have been the other channel, but there was more water there and it was the better channel at that time.

(Testimony of Captain Chris Olson.)

Yes, I saw the "Stanford" when she was going out.

By looking at the range I was watching the vessel.

The master of a tug watches his tow, yes, and sees whether or not he goes in the right channel.

The range referred to was astern.

In watching the range I was watching the vessel all the time.

I had been towing through that channel the whole summer, except *except* about four weeks that I was up the river towing, but outside of that, I was towing up the channel every day or every other day.

I was towing through this channel and other channels; we were always hunting for the best place; it was a very deep running vessel and we were always looking for the best place.

Yes, I have struck two vessels on the bar in my career.

When a vessel touches on a bar, by watching them close you **[72]** can tell right away. I have been able to do so and I have never heard of any vessel striking that I have towed out unless I have been able to tell it myself. The vessel has a peculiar motion; it kind of stops sudden and furthermore you can tell by the hawser, and at that time they have a sensitive jar or motion that you can tell right away.

The tow-lines play out.

If a vessel touches on the bar there is an extra heavy strain; you are bound to take the momentum a little bit and you can tell by the hawser right away.

I did not notice any such sensation from the "Stan-

(Testimony of Captain Chris Olson.)

ford" touching when we went across the bar. (Page 8.)

I took sounding on that day. The captain told me that he had four fathoms and a half, or 27 feet.

The boat was drawing nineteen feet ten forward and twenty feet two aft.

According to my judgment a depth of 27 feet or four fathoms and a half is sufficient for a vessel drawing twenty feet two aft. That is plenty of water.

The condition of the bar is sand, sandy bottom.

I never knew of any rocks or other similar hard substances having been discovered or found on the bar.

There are no rock head-lands within a considerable distance on either side of the bar.

The first head-land with rocks on it on the north side would be Point Granville and on the south side would be Cape Disappointment. It is about forty miles to Cape Disappointment and about twenty miles to Point Granville.

A. No, sir; I did not observe any movement or any shaking of the mast or top hamper of the vessel as she went over the bar.

I think such a movement would have been seen by me if the **[73]** vessel had touched on the bar or bumped on the bar with any force. (Page 10.) I was not intoxicated on that day and had not been for a long time previous to that time.

No, I was not drunk on that day, and I had not been for a long time before that day.

(Testimony of Captain Chris Olson.)

I had not been drinking at all. (Page 11.)

Cross-examination.

While the "Stanford" was lying down on the harbor I was employed on the Government dredge.

I left the dredge as soon as we got through with the work there, I think the first or second of October.

I took the "Cudahee" after leaving the dredge.

I had been on the "Cudahee" about two weeks before I took the "Stanford" out.

During that time the bar was pretty rough. I had no opportunity to tow any vessels at all. We did inside work.

The day that we went out was the first opportunity that vessels had to go out. (Page 12.)

No, the channel was not new; we had used it during the summer.

The north channel was the old channel, that was the best known channel that was marked straight through.

The south channel was not new to us because I had used it during the summer.

The channels don't change much, they don't change quite as quick as that.

I think this south channel was used in June; I am certain I used it in July.

I remember one special tow we took in there and we felt a little bit uneasy about it, it was an old ship, the old ship [74] "St. James"; we didn't know which channel to take, but we would get the benefit of the channel if we took that channel. I remember it was in July; I don't remember whether it was be-

(Testimony of Captain Chris Olson.)

fore or after the fourth.

Q. That channel, however, was not buoyed.

A. There was one buoy they started there. (There was one buoy they started from.)

There was a red buoy, the outer red buoy. That was a mid-channel buoy.

The general bearing of this south channel; it went southwest or south by west, but I couldn't give you the exact course out. As long as you could see the range, you went by that range and the current is so familiar there that you can always steer on a direct course.

That range was laid by the red buoy and the lone-tree on Damon's Point. You got your range after passing the red buoy.

The actual crossing of the bar would be probably four or five hundred yards from the red buoy. (Page 14.)

That is by this channel I could not tell you the exact distance.

I was on the dredge about four weeks. Before I went on the dredge I was on the tug "Printer"; I left the "Printer" to go on the dredge.

I have always worked as a tug captain for this same company. I worked for Preston & McKinnon and then the Simpson Lumber Company and then for this company. I worked for the other companies before this company was formed.

I am not now working for the Gray's Harbor Tug Boat Company; I am working for the American Pacific Whaling Company (Page 16). At the time I

(Testimony of Captain Chris Olson.)

took the "Stanford" out the wind was from the northwest and the swells were coming from the west north. **[75]**

It was better to use this channel with a northwest swell and anybody that has been around the bar for 25 years can pretty near tell the best place by the swells and the way it acts. You gain this knowledge from your own observation.

Q. Captain, how did you come to use this new channel, is it charted, and were the soundings marked on the chart and furnished to you, or did you simply gain knowledge of it by navigating it?

A. Yes, you gain knowledge by navigating and anybody that has been around the bar for twenty-five years can pretty near tell the best place by the swells and the way it acts.

Q. By the water you can tell?

A. Yes, I wouldn't be afraid to go over any bar, I could pick out the swells and pick out the best water.

Q. That is the information you gain from your own observation? A. Yes, sir.

Q. Of course, that don't tell you the depth of water at every particular point; it just shows you where there is the deepest water?

A. Yes, sir. (Pages 16–17.)

At that time on the average tide we had about 24 or 25 feet of water in the north channel, and in the other channel. In this south channel we would consider there was about 3 feet more water. I was towing barges in and out during the summer.

(Testimony of Captain Chris Olson.)

I would consider them vessels, only, they were dismantled.

I don't think I towed any sailing vessels. (Page 17.)

I could not tell how many barges we towed in, sometimes we would get one every day, and sometimes two a day, and sometimes there would be two or three days that we would not have any.

They were working on the jetty at that time.

They all came through successfully; we had no accidents with any of them. **[76]**

We touched bottom once with one of them, I don't remember which one it was, but there was no damage done.

I didn't know that a barge was lost on the bar; there was steamer lost there, the steamer "Collier." (Page 18.)

I have no knowledge of a barge that came in and capsized or floundered there with a cargo of stone. (Page 18.)

Q. What kind of a hawser did you have on the "Stanford"?

A. We had a wire hawser and towing machine.

Q. You had only the one line? A. Yes, sir.

Q. And the towing machine, as I understand it, is automatic, it pays out automatically?

A. Yes, sir. (Page 19.)

No, the bar was not breaking on that day, there was no sign of a break on. It was an ordinary northwest chuck.

We crossed out with the "Stanford" about one

(Testimony of Captain Chris Olson.)

hour before high water, and according to my best experience, that is the best time to cross the bar, because at that time you will not have any more raise on the bar. (Page 20.)

Before that time it keeps on raising, the tide gets higher.

According to my experience, the best time is one hour before high water, and an hour after that is not the best time.

Two hours before flood tide is not the best time, then you don't get all the raise. What I mean; according to the tide tables everything after an hour before high water, the water you get on the bar don't amount to anything; there is no raise on the bar after that. **[77]**

When I went and looked at the bar I went and tied up, but I can't recall whether I tied up near the "Stanford" or whether I tied up at Westport.

When I looked the second time it was about an hour's flood as near as I can recall it. That would be about noon probably.

I figured that the condition of the bar at that time, that by one hour before flood tide she would be all right.

I simply wanted to get high tide.

No, I have not been a drinking man. I have had a few drinks and have probably felt it a few times in my life like a good many others have. (Page 22.)

Yes, there were two more vessels going out over the bar that day. They were the "Americana" and the "Fred J. Wood." They were both smaller ves-

(Testimony of Captain Chris Olson.)

sels than the "Stanford."

The "Daring" towed out one, and the "Printer" had the other one. The "Printer" is about the same size as the "Cudahee," but it has not got the power that the "Cudahee" has. The "Daring" is a larger boat.

When we crossed they were probably two miles out.

Capt. Johnson was on the "Daring," and Capt. Erickson was on the "Printer." (Page 25.)

I did not speak to those captains during the day.

If they had told it was all right, it would make no difference, to me, I would go out on my own judgment.

When I went and looked at the bar, I went to the narrows, about two and one-half miles from the bar.

If someone else had told me the bar was not suitable for towing out, if I was not able to see the bar, I might have taken his signal, but if I was able to see the bar, I would have gone **[78]** on my own judgment; I believe a man should use his own judgment about that.

When I went out I kept within the range as near as I possibly could.

When we passed the red buoy, you put your tow on the range and go out on that.

No, sir; I don't know whether the "Stanford" struck or not.

After we got outside the captain of the "Stanford" told me it struck. He waited for me to come alongside, when he told me he had struck.

(Testimony of Captain Chris Olson.)

That was the first I knew anything about her striking and I was very much surprised to hear it at that time.

The average draught of the barges that we towed were 19 or 20 feet.

We always ascertain the draught of the vessel before taking her out on the bar.

The south channel is in use at the present time.

It has not been in use continually since that time. (Page 27.) No, I did not report to the Grays Harbor Tug Boat Company that the "Jane L. Stanford" had struck. I did not report to the office of the Slade Lumber Company that the Stanford had struck.

Captain Peterson told me that he had struck.

I couldn't hardly believe it, the amount of water there was there, and I asked him if there was anything wrong and he said no, and he went about his business and I thought there was no more to it and I didn't know that there was anything to report.

I have seen, and I know of a few cases, that makes me think that it is a common practise among some of the skippers to endeavor to get their boats overhauled or repaired at the expense [79] of the tugboat company, if possible. (Page 31.)

Q. Now, referring to this channel which you followed and which counsel has referred to as the new channel, that channel has been open before, that is, in other years that channel had been used or a channel at that place?

A. The channel had been there during the sum-

(Testimony of Captain Chris Olson.)

mer previous to that fall; the summer of 1910.

In going over the bar we always take soundings, especially in going out.

When we tow a vessel out we always take soundings.

Q. I understand you to say that this channel had not at that time been buoyed by the Government, is that correct?

A. That is correct. (Page 31–32.)

Yes, sir; it is the practice of the tugboat captains to keep constantly informed regardless of the Government buoys, as to the best channels in and out of the river. (Page 32.)

(Page 33.) I never heard of any barges being wrecked on the bar, loaded with rock. If there had been any such obstruction as that on the bar I surely would have known it.

The barges which we towed during the summer were dismantled ships, the old Clipper ships dismantled. They were used for carrying rock from Puget Sound to Grays Harbor.

This rock was taken inside the harbor and discharged on a wharf and then taken out to sea by rail.

The tonnage of those ships was probably from twelve hundred to sixteen hundred tons, I guess.

They were a great deal larger ships than the "Stanford," some of them were more than twice the tonnage of the "Stanford."

I never heard of any rock either from a scow or from one of the barges being lost out there in the

(Testimony of Captain Chris Olson.)

south channel. I never heard of any. [80]

The south channel is quite aways, a mile or more from the nearest jetty. About three-quarters of a mile.

Deposition of H. K. Johnson, for Respondent.

Been going to sea 43 years; been towing out of Grays Harbor for twenty-five years; now master of Grays Harbor Tug. Remember the "Jane L. Stanford" going ashore on spit. As soon as tide floated her she commenced to pound. He started her off. She pulled off hard. They all pull off hard when they go on, on flood tide broadside (page 104); it was not what we call smooth (on the 25th); nothing breaking; and no large chop on. I passed right by her ("Stanford") going out; the channel used was the proper channel; I would use the same channel; I have known Captain Olsen for 33 years; I have worked along with him as master of one of the tugs and I worked as mate for him (page 105). He has always been considered a capable navigator since I knew him; I hired him to go up on drydock when he took the "Cudahy." No, the Company did not make a fuss and object; they did not say a word. It was only temporary; there were three captains and we needed a fourth man. Olsen had just left the "Printer" three weeks before that; he had been towing deep vessels with it. Drawing 18 or 19 or 20 feet; I have observed a great many vessels ground on a sand bar in the harbor. Once in a while I have seen vessels lose their shoes down there and another spring

(Deposition of H. K. Johnson.)

a leak, so we had to put her on drydock; that was three or four years ago. It was pretty rough water. It is always rough on spits on a rolling swell. A vessel of the size of the "Stanford" and laden with lumber and pounding on a sand, is going to damage herself. Her seams are going to open. (Page 108.) I think I pulled on her probably near an hour or something like that; I turned her over to the "Traveller." Yes, I heard a dozen say she bumped. (Page 109.) I can't say; from the way the "Jane L. Stanford" on the bar (beach) there, whether it was serious enough to spring every butt on the ship and open up all the seams. I can't say she might have met with all kinds of things before I came. If she had made [81] three or four feet of water I think I would have heard of it. (Page 110.) I heard she should have gone on the dryrock here. She was too big for the ways down here. Yes, I say she was pounding on the bar. Yes, you take any vessel laying on a bar will pound, with the flood tide coming in. You need not tell me about the spits down there, I can tell you lots about it. I say the "Jane L. Stanford" was on a bar and was pounding; yes, sir; she had a list. (Page 111.) I went over the bar ahead of the "Stanford" on the 25th. We call it smooth when the bar is in that condition. I towed out the "Fred J. Wood." She draws a couple of feet less than the "Stanford"; we were quite a bit ahead of the "Stanford"; the "Cudahy" was at the red buoy when I came over the bar. I

(Deposition of H. K. Johnson.)

could see her; the "Printer" towed out the "Americana" that day.

In the testimony taken by Dan Pearsall, United States Commissioner in the City of Aberdeen, Captain H. K. Johnson, master of one of the respondent's tugs operating on the bar at the time of the accident to the "Jane L. Stanford," gave testimony on cross-examination, appearing on pages 113 and 114, as follows:

There was no other tug out on the bar when I towed the "Wood" out. The "Cudahee" was at the red buoy at the time I came over the bar.

Q. Did you know that the "Cudahee" started out?

A. Yes, sir.

Q. You could see her? A. Yes, sir.

Q. Did you signal to her with your whistle?

A. I whistled to her, yes, sir.

Q. What did you whistle for?

A. Well, I whistled, I thought there was a swell on and they all signal to me lots of times when too much swell on, but I go on about my business. [82]

The channel changes, yes. We have the south channel now, as when I towed out last July it is the same to-day as last July. I had no buoy either, only looking in the woods. I know of no cargo of rock that was ever unloaded or wrecked down there. I never heard of any load of rock dumping in there. I never heard of any rocks. (Page 114.) There were no rocks lost there when they were building the jetty. Rock will not last long in that soft sand. They will fall in the water tomorrow and the next day they are

(Deposition of H. K. Johnson.)

gone. The steamer "Tullis" was lost there seven years ago, and there is 40 feet of water where she was lost. I think rock or anything of that sort dumped on that sand would go right down.

Testimony of George Chicoine, for Respondent.

My home is at Dalles, Oregon.

I am not now employed by the Grays Harbor Tugboat Company. (P. 35.)

I was chief engineer on the "Cudahee" in October, 1910.

I watched the "Stanford" as she went out over the bar.

It was my duty to watch it, the engineer is supposed to watch all the time when we go over the bar, watch the vessel and watch the tow-line.

It is part of my duty to watch the vessel and the tow-line and the engine.

I did not observe anything that would indicate that the "Stanford" touched on the bar.

The signs that indicate that a vessel has touched on the bar, is as near as you can tell, when a vessel strikes you can see the rigging shaking and fetching up on the tow-line, and a jar on the tow-line. (Page 36.) [83]

I didn't notice that there was any tightening up on the tow-line on this day.

I didn't see the rigging shaking.

The bar was fairly good, I have towed on lots worse bars than that, a good deal worse, in fact there were two tugs towing out that day with other vessels.

There was no condition of the bar that day to

(Testimony of George Chicoine.)

warn a tug not to cross the bar. (Page 37.)

The "Stanford" was towed out through the usual channel. The usual channel that we always towed through.

I know Captain Olson; I have known Captain Olson about 18 or 19 years.

I have shipped with him before this time in October. I have shipped with him several times.

On this day the man was sober.

As a capable master he is a first-class man, and I have always heard that he was one of the best tugboat captains on the coast, I have heard that many times.

I have served or shipped with him about 3 years altogether, within the last 18 years. (Page 39.)

Cross-examination.

The "Stanford" grounded while she was bar-bound in the harbor.

I don't know about the bottom which she grounded.

The Sand Island on that side is supposed to be hard sand.

I know she ran aground and drug her anchor. That is what they claim.

I have known Captain Olson for about 19 years, I know about his habits. I know the man drinks, yes, sir. (Page 40.)

When you cross the bar the chief engineer on a tugboat, he has got to watch the tow-line all the time and work his [84] engine according to the swell, sometimes you stop your engine dead or go at full speed or half speed according to your own judgment so as to work on the line, not to break the line, that

(Testimony of George Chicoine.)

is the duty of engineer at that time. It took about fifteen minutes to cross the bar and have to be right there on the lookout for the vessel and not break the line and I was there all the time looking at the vessel and the tow-line.

The first indication you would have if a vessel struck bottom, is you can see your rigging vibrate and your tow-line fetch up and the tug will give a jar.

Your tow-line is taut all the time. (Page 41.)

If a vessel just touched you would have a jar on the tow-line, yes, sir.

We had no jar at all on the tow-line on the "Stanford" on the way out. It went very nicely outside, that is my belief, that there was nothing happened when we crossed and I was surprised when I heard a report that she touched.

I have been engineer on a tugboat when the tow grounded.

I don't know how many times, but quite a few times.

I have had all kinds of trouble.

When they do strike you can tell right away by the rigging and the tow-line.

If you didn't happen to be looking at the rigging you can notice by the tow-line, there will be a jar, it would fetch up.

I was surprised to hear that she struck, that is all I know.

I have towed out over the bar on rougher water than we had this day. Yes, I have towed a vessel

(Testimony of George Chicoine.)

the size of the "Stanford" over a bar worse than that.

I had been through this south channel a number of times before I towed the "Stanford" out. [85]

I can't tell you how many times. I have not towed for a long time through there.

I don't know anything about any rock that was dumped out there in that south channel. (Page 42.)

Well, my part of the work was in good shape, the engine was in good shape and running and everything was in first class condition and I was doing the work inside. I haven't anything to do on the outside, I can't say anything about that part of it, I have nothing to do with that. My duty is just running the engine and looking after the line on the bar. On a rough bar in and out that is our place to look at.

At that time we had an old-fashioned hawser, we had no towing machine.

If there had been a cargo of rock dumped on the bar, I believe I would have heard of it.

I never heard of any rock on that bar.

I saw the "Stanford" aground. She must have been hard aground if it took two tugs to pull her off.

She listed a litle bit. (Page 34.)

Testimony of C. L. Davidson, for Respondent.

My name is C. L. Davidson.

I worked for the Grays Harbor Tugboat Company for about 5 years.

I am not employed by them now.

(Testimony of C. L. Davidson.)

At the time the "Jane L. Stanford" was towed to sea I was firing on the "Cudahee." (Page 45.)

Well, the best that I can remember about it was that we went down that morning from Hoquiam, if I remember right, and went out and looked at the bar and went back up and it seems to [86] me we went up to the Westport dock and stayed there for the tide and then we went back and took a second look and went and got the boat and started for sea with her and we got out alright, I didn't see anything unusual.

The bar was not very rough; it looked like it was fairly good.

We towed out through the south channel, that is the same channel we had been going through most of the time.

I had been on this tugboat about three years off and one, prior to this time I towed the "Stanford" out.

I watched the "Stanford" as we went out. That wasn't a part of my duty, but I was interested in the work and I watched it.

I didn't see anything that indicated it touched on the bar. (Page 46.)

If she thumped on the bar her rigging would shake like and her hawser would have played out.

I didn't see anything to indicate to me, at all, that the "Stanford" touched on the bar. I was standing on the deck where I could see it all the time.

The second time we went to look at the bar there was nothing unusual about the look of the bar that would warn a tugboat captain not to go over it.

(Testimony of C. L. Davidson.)

There was no unusual condition about the bar that we observed as the "Stanford" was going over.

It generally takes about ten minutes to go over the bar, or something like that, that is, from the time your tug gets on the bar until your schooner goes over it. You take it a little easy as you go over there, the engineer holds the engine down some. (Page 47.) Captain Olson was not intoxicated on this day. He had not been drinking at all on that day. [87]

I have known Captain Olson for about 10 years. I was shipmate with him, first in 1907.

I was with him 5 or 6 months at that time and I have been twice since then with him, I served six months with him since then, I was six months straight and another time I was with him a couple of months and so altogether I have served about fourteen months with him.

I have chief engineer's papers at the present time.

With regard to Captain Olson's ability as master of a tugboat, I will say that he is the best on the coast.

Cross-examination.

I was fireman on the "Cudahee."

She is an oil burner; yes, sir.

I was not on watch at this time.

I had nothing to do with the navigation of the vessel.

I don't think the "Stanford" struck on the bar going out, if she did I didn't see anything to indicate her striking.

(Testimony of C. L. Davidson.)

I was watching the "Stanford" all the time going out.

I was watching to see what she was going to do.

The "Stanford" is a pretty large vessel, I would judge she would be of pretty big draught. (Page 50.)

My recollection is distinct as to the "Stanford," because I watched her on the way out, and what I remember the captain saying she struck on the bar when we came back in, and I remember that vessel more than any of the rest of them.

It is not exactly common, no, for vessels to ground in the harbor, but sometimes it will happen.

One was down there they had to unload, what was the name of that vessel now, Captain Rock was on the schooner but I [88] don't remember her name, it seems to me it was one of the Vance schooners, they had to take the cargo most all off of it and bring her back here. I think she went on drydock, I am not positive, but I think she went on drydock.

As to the nature of the bottom down there, it seems to be sand as far as I could see at low tide. I have not seen a number of them.

Some of the sand spits have logs; yes, sir. (Page 53.)

I never heard of logs or other hard substances on the bar.

If there had been any obstruction or danger on the Grays Harbor Bar which would result in chopping up the bottom of a vessel which would touch on the

(Testimony of C. L. Davidson.)

bar I would be apt to have heard of it, but I never heard of anything of the kind at all. (Page 55.)

Testimony of Otto Rohme, for the Respondent.

OTTO ROHME, a witness for respondent, testified as follows:

I was on the "Cudahee" at the time she towed the "Jane L. Stanford" across the bar. I was a deckhand and sailor. The mate was Oscar Olson. He is now dead. I saw the "Stanford" as she went out over the bar. I have been going to sea since 1888. I started with the company down there in 1909. When the "Stanford" went over the bar, I was standing in the doorway, right by the tow-line. (P. 57.) My duty was, when there was a heavy swell, you would have to give slack on the line so it would not break the line. I was standing there giving slack on the line so it would not break. It was my duty to watch the line, and when there was too much strain on it to slack it up so it would catch up solid again. I watched that line all the way across. I did not see anything at that time to indicate that the vessel touched bottom. If the vessel touched the bottom, it (the line) would go out like the devil as fast as it could go. We would have to throw water on the [89] line or else it would burn up. The effect on the masts of a vessel would be that they would shake like that (indicating). (P. 58.) I did not see any shaking of the masts on the "Stanford" as she went out to indicate that she touched bottom. The line did not run out or tighten up at any time.

(Testimony of Otto Rohme.)

There was eight foot slack and she never took up an inch when they claim she struck. I saw the "Stanford" during the time she lay inside the bar waiting to go out, yes, sir, every day. She drifted ashore one night on a sand spit. When I first saw her, she was hard aground because the tide was out, but when the tide came in she was working heavy on the sand spit. I was on the "Traveller" which took her off. The captain's name was Sanborn. I can't say exactly how long a time it took the "Traveller" to pull her off (P. 59), but we had to hold on to her eight or ten hours to get his anchors cleared out. He had to heave them up. They were twisted. I couldn't tell where they were lying, I couldn't get close enough for that. It took eight or ten hours to get his anchors clear and during that time the tugboat hung onto her. I was there all day. It looked to me that the anchors were close to the vessel; of course, I couldn't exactly say as she was hard aground and the chain was leading in most any direction, but you couldn't tell where the anchor was leading. I don't remember the exact date it was before the "Stanford" went out to sea. It was four or five days before. I know he had to sign up a new crew. His crew refused to work any longer and they were locked up on the forecastle (P. 60.) The captain told us about the trouble he was in (P. 61.) I should say his crew left him ten or twelve days before he went out. We held onto the vessel practically all day the day she went aground. (P. 61.) The

(Testimony of Otto Rohme.)

"Daring" was alongside of her when we got there. I think the wind and storm drifted her. [90]

On cross-examination, he said:

I am a Norwegian. I was on the "Traveler" the day the "Stanford" went aground in the harbor. We hung on to her for ten or twelve hours. I am positive of that. (P. 62.) The water was rough inside the harbor when she went aground, very rough. When the tide came in she was thumping hard. There would be a lot of jar on the boat and it pounded her a lot and shook her up. I would say it would shake her seams loose. No, it was not hard to get her off because the storm helped to pull her off. No, sir, she was not on the sandspit ten or twelve hours. I never said that. (P. 63.) I said we were hanging on to her all day until she got her anchors clear. She went aground that night. No, sir; I did not see her go aground. The captain and the mate told me that they went aground that night. The captain told the skipper he had a mutiny on board. When you are on a little boat, you can hear whatever is said sometimes. I don't know what time she went aground. It is a sandy beach where she went ashore. (P. 64.) She got off in the morning. We left Hoquiam in the morning, I don't know what time, exactly, about nine or ten o'clock, I guess, perhaps a little earlier, I can't say for certain. We hung on to her from nine o'clock in the morning until into the afternoon. She was bumping hard on the sand. It is rough down there when the wind is blowing, you bet it is. I was on the "Traveler"

(Testimony of Otto Rohme.)

at the time. Yes, we hung on to her ten or twelve hours. Yes, sir; we put her in anchorage when we got her off. It did not take him long to pull her off, half an hour I guess; no, not an hour. It did not take him very long to take her off after the water came. (P. 65.) I don't think it took him over half an hour. When he went aground, he went aground with both of his anchors out. I can't say exactly how far he drifted. Maybe seven hundred feet. That would be **[91]** about two hundred yards. I saw him when he was anchored and bar bound and he must have drifted about seven hundred feet. That would be about two hundred yards. He had out all of his chain on one anchor. I don't know how much chain he had out on the other. He had quite a lot and it was around the anchor. He took his anchors right with him when he drifted. (P. 66.) He took all the chain with him. The chain was twisted around the anchors. That is how he got adrift, he started with the tide and got the chain around the anchors. That was the same with both anchors. It took a long time to get the anchors clear. That is why we hung on to her, we couldn't let him go and go on the beach again.

In towing across the bar you usually allow eight or ten feet for slack. No, when you play that eight or ten feet you are not at the end of your line. You have two-thirds of it out and a third back. You just give that slack on the bit. You always keep six or eight feet. If you see the line tighten up too much you give her some. If you do pay you allow him

(Testimony of Otto Rohme.)

about eight feet slack, a little better than a fathom; that is seven or eight feet. You can't be exact to the inch. You don't measure. (P. 67.) It is part of my duty to keep the line taut. You can't pick up any slack, but you can pay out and just keep it taut. When we were towing the "Stanford" out, the line was in the water and when she tightens up that is the time you have to have your slack, so she won't break.

All I saw of the "Stanford" was when she was aground was when I was on the "Traveler" and we pulled her off. We left here earlier and got hold of the "Stanford" about nine o'clock. We couldn't get to her when we first went down because it was low water. We generally leave here about seven and it took an hour to go down there. We got hold of her about nine [92] o'clock. It might have been a little later, about nine or ten in the morning or something like that. I can't exactly remember it was so long ago. Yes, and when the water came in she was pounding pretty heavy. (P. 68.) She had a pretty heavy list when we first went down there, about this way (indicating). That would be about forty-five degrees. Yes, when the tide came in, she was rolling on the swells and she would lift up and then come back again. When she would hit bottom and roll there you could see the rigging shake. She was loaded; yes, sir. Yes, she pounded there for several hours. She couldn't get up there on low water that is a cinch. There might be an old anchor there or something. I am on no boat at all now. I

(Testimony of Otto Rohme.)

have been off the boat since last February. I am doing nothing at present. I have been on all four of the tugs. (P. 69.) I have seen other vessels aground on the harbor here. I have seen them pound and did considerable damage, some of them. Some were easy to get off and some were not. Yes, it took us five days to get one off once. When a vessel goes aground and pounds on the beach it is not usually easy to get them off. It took five days to get one off. Did she pound? Sure she did. I have seen other vessels pound on the beach and it was easy to get them off, when it was rough. Yes, the captain had to lock the crew in the forecastle. I don't know whether they were afraid. (P. 70.) They refused to work. I don't know whether they were afraid the vessel was going to pound to pieces. He had to lock them up for mutiny. That's all I know about it. I don't know whether she was pounding so hard and so heavy that the crew got afraid and started a mutiny or not. I heard what the captain said. I didn't say I spoke to him. (P. 71.) [93]

Testimony of Otto Rohme, for Respondent (Recalled).

OTTO ROHME, being recalled by respondent, testified as follows:

Captain Olson was not intoxicated on the day in which he towed the "Stanford" out to sea.

On cross-examination, he said:

I am a member of the Seamen's Union. I know

(Testimony of Otto Rohme.)

Capt. Petersen. I was not a member of the Seamen's Union at that time. (P. 123.)

Witness excused.

Testimony of George V. Sanborn, for Respondent.

GEORGE V. SANBORN, a witness on behalf of respondent, testified as follows:

I have lived in Hoquiam fifteen or sixteen years, I have been going to sea since I was fifteen years old and am forty-seven now. I have been going to sea about thirty-two years. I have been master about eighteen years. I have been master of tugs for thirteen years, pretty near fourteen years. I remember when the "Jane L. Stanford" went aground on a sandspit below sand island. I was master of the "Traveller" at that time. I remember of assisting in towing her off. The tug "Daring" helped me. (P. 81.) I think the "Daring" towed her off stern first and I took hold of her bow and held her while he got his anchors. I think it was about four or five hours that we had a hold of her altogether. She came off quite hard. I observed her before she came off and she was apparently pounding. I made an entry in the log of pulling her off the place she was to safe anchorage. The bottom where she went aground was sandy, hard, sandy bottom. I think it was about nine o'clock when she came off. It is quite a while ago, but it was around nine o'clock. The trouble seemed to be with his anchorage. While he was clearing his [94] anchors, his anchors were foul. One anchor

(Testimony of George V. Sanborn.)

laid in quite far in shoal water and we tried to hold him off from swinging all we could until he got hold his anchor. I forget whether he had both anchors down or not, anyway one was quite foul. (P. 82.) It was high water and he was right over his anchor. I was not down at the bar on the 25th when the "Stanford" went out. I don't know anything about the weather or circumstances on that day. I was acquainted at that time with what is called the new channel or south channel, out of which the vessel was towed on that day. It was the customary channel at that time for towing vessels of that depth. The channel at that time was deeper than the north channel. I can't give you the depth in feet. It was so much deeper that we used it. We abandoned the old channel and towed in the new channel. (P. 83.) There are no rocks near this channel, I know that.

Q. Captain, if after this vessel was put up on the ways she was found to be in this condition: A part of her show after and forward was gone; part of the keel injured by striking on the rocky bottom; all the butts and all seams aft from keel to cover board were started, and quite a number of seams fore and aft on the whole length of the vessel had started, the water gudgeons were slightly twisted, then we found the steam pipe from the pump had broken off during the jam, had broken off just below the deck and some of the planks forward were cut just like a sharp axe had come down on them; they were cut and we had to put pieces in them, had to put pieces in there, quite a few of them. I will ask you, Cap-

(Testimony of George V. Sanborn.)

tain, to state whether in your opinion such an injury is likely to have happened on the Grays Harbor Bar.

A. No, sir; there are no rocks on the Grays Harbor Bar, the only rocks that were around there was what they were putting there for jetty works, it was all sandy bottom.

Q. Now, I will ask you this question, assuming this vessel went ashore on a sandspit some days previous to the time she crossed the bar and that she afterwards crossed over the bar and at some time received the injuries she is claimed to have received, which Captain Peterson has described, I will ask you which is the most probable as to whether or not she received those injuries on the bar or on the sandspit, assuming that she received such an injury as Captain Peterson described. **[95]**

Mr. HANFORD.—I object to the question as it calls for the opinion of the witness and is *competent,* irrelevant (P. 84), and immaterial. I have no objection to counsel asking the witness what he knows of the damages stated but it is incompetent to ask a hypothetical question in that form.

Q. I am asking his opinion. Just state, Captain.

A. If there is no rocks on the sandspit where she was, I would say that she laid on her anchor; that is the way I would express my opinion if her bottom was cut.

Mr. HANFORD.—Q. You state that as your opinion. A. Yes, that is my opinion.

Q. Now, Captain, what is the usual cause of a vessel, a staunch, sound vessel such as the "Jane L.

(Testimony of George V. Sanborn.)

"Stanford," that they suddenly found making water, it requiring the work of both pumps and all hands constantly to keep her even, with her seams started, aft from keel to cover board and her butts torn loose and her gudgeons wrenched and the steam pipe broken below the deck and her planks forward were marked from one end to the other and her shoe was torn off fore and aft and her keel dented throughout its whole length and that was found to be the condition of the vessel immediately following a severe jar while crossing the bar, what would you say would be the cause of those injuries.

A. Well, if she was marked up as bad as that I should say she must have been foul with some rocks or some hard substance that would do all that, she never could do it on plain sand.

Q. I will ask you, then, under the conditions that follow (P. 85), whether or not your opinion is that the vessel had struck bottom or rested on her anchor; after the vessel was put on drydock she was found to have apparently hit with her keel on a sandy bottom; about thirty feet of the outer shoe and ten feet of the inner shoe on the heel were torn off the whole length, the whole after end of the vessel, extending to about one-third of her length; the vessel was all shaken in the seams; the butts along the bottom and all over the vessel were more or less started; the keel in several places on the places mentioned before, the pieces of the shoe split off and in some places cut in deep enough to take off or scalp off the keel; in the vicinity of the foremast, underneath the

(Testimony of George V. Sanborn.)

foremast on the port side there were two pretty deep cuts and the planks bruised and cut in about two and a quarter inches deep. The keel right opposite that place was slightly damaged, and the shore for a distance of about ten feet badly split up, and quite a portion of it gone. Right across the starboard side of the planks there was one bad bruise and a score of considerable length; these latter damages were fresh and had apparently been made by the vessel going upon sharp rocks; also places damaged along the keel to about within thirty feet of her heel; the stern post was found set about one-fourth of an inch in the ship's **[96]** counter; rudder not working true, that being swung, and the steam pump out of order, I think that comprises about the damage—and the butts on the bottom and more or less all over the vessel every butt in one-third the length of the aft end of the vessel, every seam were shaken, and nearly all the (P. 86) others were more or less shaken. That statement of the damage to the vessel such as the "Jane L. Stanford" in addition to the statement of damages recited to you by Mr. Morgan would indicate what: That the vessel had struck on bottom and received a severe blow or that she had merely rested on her anchor. I ask you that as a seafaring man, Captain, and you know the construction of the ship.

A. I should say that she laid on some rocks and pounded, as far as I can see, if she suffered all that damage, she couldn't have done that by striking in crossing over smooth sand and striking a few times

(Testimony of George V. Sanborn.)

as they claim she did. She could have taken off her shoe, that has been done before by striking on the sand but she couldn't bruise her bottom up by crossing the Grays Harbor Bar.

Q. In other words you want to state—you don't state that as a fact.

A. I state it as a fact, by experience.

Q. You state it as a fact that the "Jane L. Stanford" suffered the damage of which she complains in this case by going on a sandspit down here in the harbor and not striking the bar in crossing out to sea, is that what you say.

A. What I mean to say and state it as a fact that she could not do all that damage on the Grays Harbor Bar, because there are no rocks or hard obstructions, only plain sand.

Q. Then a vessel such as the "Jane L. Stanford," 861 tons, laded with lumber by being severely struck upon the bar at one time could not damage herself to that extent. A. She could not; no, sir.

Q. That is what you state your experience is.

A. Yes, sir. (P. 87.)

I am captain of the "Traveller." I wouldn't say what time we got the "Stanford" off the sandspit. We left Hoquiam at six o'clock and it takes us usually an hour and a half, I will say to go to where the "Stanford" laid at that time and it was probably [97] a half hour or maybe a little more before I got hold of her, maybe a little longer. It is a long time to remember, four years, but it was somewhere between eight and nine o'clock. I have the impression

(Testimony of George V. Sanborn.)

it was nearly five hours we were working keeping her off. That would make it about two in the afternoon, although I do not swear to that as a fact. The "Daring" assisted in getting her off. She took hold of her before I got there, she got down there before us about fifteen or twenty minutes, I believe. I think he had just started when I got there, just started to get her off the place where she was resting and he was coming astern when we came on to her. (P. 88.) There was a pretty heavy swell. She is a pretty heavy vessel. She was pretty heavily laden with cargo. She was fully laden with lumber. You know, of course, that a small vessel will pound before a large vessel but any sea will move a vessel, the water will move her but it will not move her so quick. But the water will move her. You take a vessel such as the "Jane L. Stanford" laden with lumber, pounding on the beach she has got to open up if she is not strong enough to stand it. If she opens up she is going to have to take water. Yes, you will have to pump her out. Yes, if the "Stanford" has been damaged as you state, she has been leaking. Yes, she will leak as soon as she is opened up. She was not listed when I got there. She may have been listed during the night, but I did not see her. (P. 89.) Yes, I think Otto Rohme was a deck-hand on my ship. As soon as we got up close to her, we had to see her. We couldn't help it. I am an observing man, trained to observation; and if the vessel had been lying on an angle of forty-five degrees, lying on her side and pounding,

(Testimony of George V. Sanborn.)

I would have noticed. As far as I remember, [98] the vessel was just coming off as we came to her, while we were around her she came off. We held her off until he got his anchors. I do not know how much chain he had out. He broke the windlass I think during the time and he had some trouble with the messenger chains, in getting the (P. 90) anchors. I think he had two anchors out, I am not sure. I don't know whether he had one out to one side and one in front, they probably dragged together when they started to drag. When a vessel drags her anchors she drifts over them and pulls them after her. I am acquainted with the different tugboats belonging to the Grays Harbor Tug Boat Company. I know all of them. The "Daring" is the largest. The "Traveler" comes next in length. The "Printer" next, and the "Cudahee" is the shortest. There are four (P. 91). These tugs are still in Hoquiam. I am acquainted with the "Jane L. Stanford." Yes, I towed her several times. I don't know her tonnage. She is one of the largest vessels operated out of Grays Harbor. I presume she is a staunch ship. When the "Stanford" is loaded she draws somewhere around twenty feet. I would call that pretty deep. Yes, I have heard of other vessels grounding on the sandspits in the harbor before they cross the bar, here on Grays Harbor. It is quite a common occurrence. I have seen it a great many times before (P. 92). We had one other vessel that went on shore down there that we were sued for damages done to her since then. I don't know whether under

(Testimony of George V. Sanborn.)

like conditions a vessel damaged as she was, of her size, would shake her seams loose and the oakum out. I never examined them to see. I knew about several vessels doing damage but that is the only one I knew personally about it doing any damage. I would hate to have a vessel go ashore there. Yes, I think she suffered some damage. Yes; I thought so at the [99] time. No, I did not say anything to Captain Peterson about it. I did not see the "Stanford" doing any pumping after she was aground there. I heard that she did but couldn't say they did personally. Pumping with a steam pump; yes, sir. (P. 93.) I don't know whether they pumped right along, I say I didn't see them. If they had to pump, they would have to pump right along, if the ship would be leaking; yes, sir.

Upon redirect examination, he said:

I know that they had some trouble with the crew and that they put that crew aboard the "Hawaii," I think it was. The crew that they had left immediately after this accident (on the sandspit), yes, sir. Yes, if I remember right they shipped that crew to the "Hawaii" and the crew left the "Hawaii" and went on the "Stanford." (P. 94.) No, sir; if there were cuts in the planking some distance from the keel and pretty far forward, just off the bow at such a height that if the vessel had been lying on the sand the cuts would have been up to the height of one's shoulders or eyes, I would say that such an injury could not have been received on the Grays Harbor bar. A vessel would strike on her

(Testimony of George V. Sanborn.)

shoe or keel. It would strike on the keel first. (P. 95.) She could not do any damage to her planking by striking on a bar.

On cross-examination, he said:

I know of no obstruction or impediment to navigation whatsoever near that south channel, where the bar was at that time, no rocks. There is shifting sand, just shifting sand. The shoal part of the channel is straight. You approach the bar with deep water all the way and there is a ridge and you go off that ridge into deep water again. There is a ridge of sand at the mouth of the harbor and what they call the bar is the [100] deepest place and you cross them at right angles so it is pretty straight. It takes about a minute to cross the bar, it is less than a thousand feet perhaps. The depth of the water approaching the bar we maintain at forty-five feet and it gradually (P. 96) shoals up to the bar and the shoalest part we call it about three or four casts of the lead, about as far as one can throw it. We get about three or four of those casts in the shallowest water and then we are out in deep water again. The shallowest water at that time was about twenty-five or twenty-six feet of water at that time, it all depends on the heighth of the tide, some use larger and some smaller. The last hour before high tide is the best time to cross the bar. If you have a good-sized vessel to take across you would usually take the last hour to cross. We usually try to cross within an hour or a half hour of high water, it all

(Testimony of George V. Sanborn.)
depends on the size of the vessel but the last hour don't raise it.

I have known Captain Chris. Olson sixteen or seventeen years. He was working here when I came and I don't know how long before. (P. 97.)

Upon redirect examination, he said:

I would think Captain Olson is a capable captain or navigator. I would say he was as good a navigator as I would want to pick up anywhere. This is the log of the "Traveller." These entries were made by me at the time in this log and that of October 18th; yes, sir.

Mr. MORGAN.—I will read into the record that of October 17th, Monday, October 17th, 1910: "October 17th, 6 A. M. left Hoquiam for sea, towed boat "Jane L. Stanford" from off mud to safe anchorage. Gave "Stanford" water. Came to Hoquiam. Wind southeast, stormy, bar moderate." "October 18th, 7 A. M., left Hoquiam for sea, cruised off bar for four hours, nothing in sight, came to [101] Hoquiam, 2 P. M. Gave "Stanford" water again, wind southeast, light, bar rough." Well, I suppose the occasion of giving the "Stanford" water was that they needed it. I don't know what they used it for. (P. 98.) I don't know what the occasion was for giving her water on two successive days. No, sir; nothing was said by Captain Petersen at that time about requiring an extra supply of water for his steam pumps in order to keep his steam pump going.

(Testimony of George V. Sanborn.)

Upon recross-examination, he said:

When there is a heavy storm outside, it is stormy inside. We have just a swell inside. I call a moderate bar half way between rough and smooth, breaking occasionally. On a moderate bar there would be less swell inside, I suppose. If we have a real rough bar it is smooth inside because the bar cuts the sea down, that is the way it acts from my experience and with a moderate bar the sea comes in a good deal and if it is a smooth bar there is no sea inside. That (the log) doesn't tell how long we were engaged in towing the "Stanford" to anchorage. I don't remember what time we came to Hoquiam. (P. 99.) We *we* didn't cruise outside until dark. We figured on a tow. We don't ususally tow on an ebb tide, if it is rough. If we didn't see nothing outside we go in and if it is foggy we stay out longer, but if it is clear and nice and we don't see any vessels around we go in. It takes about two hours or an hour and three-quarters to come to Hoquiam on a flood tide.

On redirect examination, he said:

I have been master of the tug "Printer" at different times. That is the tug "Printer's" log-book. (P. 100.) That is part of the record on board the "Printer." Referring to the entry of [102] October 17th, I know whose writing that is. It is Captain Erickson's. Captain Erickson is another one of the Grays Harbor Tugboat Captains or was at that time. He is not now employed by the company. He is on the sound now, I think at Bremerton. Yes, sir, I pulled the "Stanford" off the sandspit on October

(Testimony of George V. Sanborn.)

17th, 1910 according to the log of the boat. Yes, I think the entry in the log of the tug "Printer" of October 17th is in the handwriting of Captain Erickson.

Mr. MORGAN.—At this time we read into the record the entry of the log of the tug "Printer" of October 17th, 1910: "Left Hoquiam 6 A. M., for sea, bar too rough to tow schooner to sea, toward barge "J. Drummond" from Jetty dock to anchorage, barge "Big Bonanza" from Aberdeen to Jetty, tug moves barges to Jetty, tug returned to Hoquiam 7:30 P. M. Stopped on her way to Hoquiam alongside "Barkentine Stanford," the sailors had mutinied on board. Wind southwest.

WITNESS.—This entry of October 25th is Captain Erickson's. It is an entry made in the usual course of entries in this book. This is a book which has been in my charge at different times as master of the tug "Printer."

Mr. MORGAN.—We now propose to read into evidence the following entry in this book: "October 25th. Left Hoquiam 7:30 A. M., for sea and towed schr. "M. Turner" from Buoy 2½ to Hoquiam. Towed Schr. "Americana" from Tank 5 to sea. Passed over bar 4 P. M. Returned to Jetty 5:30 P. M. Bar smooth. Wind N. W. Weather fine." (P. 103.)

Testimony of William King, for Respondent.

I am chief engineer of the "Daring."

I have been on the boats of the tugboat company for 25 years.

(Testimony of William King.)

I recall the time the "Stanford" went on the sand-spit. [103] I was on the "Traveller."

I recall furnishing them water twice.

When we pumped the water to them, I asked them what they were doing with all that water, and he said they were running their steam pump. (Page 116.)

He said they were running their pumps when the tugboats were not in sight. I think this was after they went ashore.

On cross-examination.

The sailors told me they were running the steam pumps.

There were three or four of them standing there.

They told me they ran it only when we were out of sight.

They only ran it when we were not around.

I got their word for it; yes, I suppose the vessel was leaking. (Page 118.)

Captain Sanbern, in response to an inquiry as to vessels that went ashore inside the harbor:

The "Lizzie Vance" was water-logged down there.

It was a three-masted schooner. (Page 123.)

The place where the "Stanford" went ashore was as bad as any.

The barkentine "S. G. Wilder" received injuries.

The "S. C. Allen," she was a barkentine, received injuries.

The "Minnie E. Kane" lost her shoe; that was a four-masted schooner.

I say that it is possible that when the "Stanford" received the injuries to her shoe, it was likely to have

(Testimony of William King.)
been caused by going ashore on the sandspit. (125.)
[104]

On the 25th day of June, 1917, the deposition of R. Peterson, libelant, was taken before A. C. Bowman at Seattle, Washington, at which time R. Peterson testified as follows:

Deposition of R. Peterson, in His Own Behalf.

My name is Robert Peterson. I am master mariner. Master of the barkentine "Jane L. Stanford" at the present time. I am the libelant in this case. I have been master of the "Jane L. Stanford" since the time of the accident involved in this case, except —I stayed home one trip; I was sick; about three or four years ago. The "Stanford" is at Vancouver, British Columbia. She is loaded for a voyage to South Africa; from there to Manila and then to San Francisco. I am going as master on this voyage. I figure she will be loaded tomorrow night or Wednesday forenoon. She will be ready to go as soon as we get men to fill the crew. I figure if we make the voyage it will take about eleven months to get back to an American port. It might take more.

I stayed with the vessel, or continued in business connection with the vessel during the time the repairs to the damage were being made, and I handled the cargo while she was in the Columbia River. There is a firm or company known as Brown & McCabe. It is a stevedore company in Portland. They were my ship brokers, and they were agents for me also. With regard to the repairs of the vessel, they

(Deposition of R. Peterson.)

were furnishing money and paying the bills. They furnished all the material and all the labor, and handled the cargo; took it out and put it in. Of the cargo, there was taken out—I cannot remember how much we had left in the vessel, but I think somewhere around a couple of hundred thousand feet we left in her. We had about the average a little over eleven hundred thousand aboard. But I cannot say exactly, it is so long ago. When we left the loading port we had a full cargo. When the cargo was put back in the vessel some was damaged. It was estimated what was broken. There is always more or less lumber that gets [105] broken in taking out and in. That is all there was damaged. There was nothing else but what little was damaged and broken from taking out and in to the vessel through handling it. I could not remember how much was damaged, but it was not a great deal. I could not remember that. There was nothing done about that damaged cargo; the freight was taken off that part of the cargo; as far as I know there was nothing else done.

With reference to an accounting for the damaged lumber between the owner of the ship and the owner of the cargo, I would not say for sure. The insurance agent, Captain Crowe, was in Portland and got figures on what we were short, but I could not state the amount; it is impossible because in fact I haven't thought much of this case lately, it is so long ago.

Q. Captain, according to the report of the average adjuster, there was 10,258 feet of the cargo that was

(Deposition of R. Peterson.)
left out and not put back. Do these figures come to your mind?

A. I could not state the exact amount. I know it was not a great quantity; I know that.

Q. Was it as much as ten thousand feet?

A. Yes, I thought it was more.

Witness' attention is called to a bunch of attached papers. Witness looks them over. Witness identifies vouchers as follows: Voucher of P. L. Cherry; James Keating; Ross, Higgins & Co.; testifying as to each that they were paid by Brown & McCabe.

Witness then identifies voucher of Robert Peterson for $50.00, testifying: That is for expenses; my personal expenses while lying there. That was for car fare and meals and many other expenses. I got the money from Brown & McCabe. Yes, that [106] *that* was my expense and I drew that to cover that.

Witness then identifies vouchers of Brown & McCabe for $25.00; Anderson & Crowe for $12.50; and Anderson & Nelson for $4.00.

Witness then identifies voucher of John Grant for $250.00, and testified as follows: Well, that was for getting the men. When we ship sailors, you know, we have to pay a certain amount for each of them. The crew I shipped in Aberdeen, as soon as I came in there (Portland) cleared out, they went away, so I had to get a new crew when I was going out. The crew that was in the vessel left me. Yes, they went away. And we pay so much advance and we pay so much for brokers—for procuring them, and they were only on board a few days after we got in, so

(Deposition of R. Peterson.)

we had to get a new crew. This $250.00 that was paid to John Grant was not paid for wages. No, for procuring the men. You see they get so much a man. That is what we used to call blood-money. That is really what it is. We pay sometimes twenty-five dollars and sometimes as high as seventy-five dollars. All depends on how times are. At the present time we pay almost anything to get men to go with us. Yes, that is a necessary expense for a ship to go on a voyage. We cannot do without it. We could not get the men any other way.

Witness then identified vouchers of Brown & McCabe for $54.17; Brown & McCabe for $1,936.35; Port of Portland, $235.36; C. F. Beebe & Co., a chart, $.25; Port of Portland, $692.70; Albert Crowe for $90.00; of a custom-house fee for $2.50; a voucher of James Keating for $9.00; a voucher of the Vulcan Iron Works for $6.40; a voucher of Geo. A. Nelson for $15.00; a voucher for telephone service of $1.40; a voucher of the Astoria Iron Works for $7.75; a voucher of Hageman & Foard Co., for $255.51; a voucher of $5.00 for making marine protest; a voucher [107] of $.25 for a chart; a voucher to John Redding for $3.00; a voucher to John A. Stephens for $15.00; a voucher to C. L. Johnson for $28.80; a voucher of $453.00 as labor for calkers, carpenters and laborers; a voucher of the Oregon Dry Dock Co., for $1161.85; a voucher for the Postal Telegraph Co., for $.53; a voucher of the Pacific Lumber Inspection Bureau for $18.50; a voucher of W. A. Pratt for $42.50; a voucher for L. E. Drumm

(Deposition of R. Peterson.)
for $222.69; a voucher of Brown & McCabe for $623.17; a voucher of $1.00 for the Hasty Messenger Co.; a voucher of $1.10 for the Hasty Messenger Co.; a voucher of Ross, Higgins & Co., for $6.60; a voucher of Allen & Lewis for $151.54; voucher of J. A. Stephens for $28.95; voucher for John Grant for $174.05; voucher for American Marine Paint Company for $160.00; voucher of Frank L. Smith for $50.28; voucher of John Redding for $3.50; voucher of C. Carlson for $7.25; voucher of J. Swanson for $20.00; voucher of Boston Packing Company *of* $15.63; voucher of Western Union Telegraph Co., for $.87; voucher for wages paid while vessel was in Portland, $627.83; voucher for $153.77 for shortage of lumber and freight on the same.

Continuing, witness testified: I do not recollect the rate that the ship was chartered for. I could tell you if I had a look at my book. If I am not mistaken, it was 57/6. But I cannot say that at all. I do not recollect how many days the ship was detained by this accident. It was between one and two months. How long, I could not say, but I think it stands down there in that list of the wages. October 26th to December 17th, inclusive. That was the time I was detained. After we got away and resumed the voyage the vessel made her ordinary and usual time in reach her port of discharge. We made the average trip over there to Brisbane. I was in command of the "Jane L. Stanford" on the voyage immediately preceding this one. It was an average voyage time for that voyage. I cannot tell you how

(Deposition of R. Peterson.)

much [108] the ship earned on that voyage without looking in my books. I could tell you if I looked it up in my books. I could not tell you offhand. I know she earned money right along. Take the next voyage after this one on which the accident happened,—I loaded in Aberdeen, if I am not mistaken. We carried the cargo to Chili. It must have been to Chili. Most of the time I was running down there. There was nothing that I recollect that was unusual on that voyage to delay me. I haven't had any delays or anything that I know of, except over on the Sound last year. With reference to the second voyage after the accident, I recollect that they were pretty near all the same right along. There has not been much difference in any of them. Average trips. Nothing coming up, one way or the other. I do not know of any other fact or circumstance connected with the case, that is material for either the libelant or the respondent. To my knowledge I do not know of any.

On cross-examination, he said:

I have been master of the "Stanford" between eight and nine years. I do not now recollect what port I came from into Grays Harbor. Brown & McCabe, the agents of my owners in Portland, made all the payments except what I made myself. I paid them by draft. All the payments were made either by me or by Brown & McCabe. I testified to $50.00 for myself. This was for expenses in port. Personal expenses. That was for attending to all the different expenses I had while I was there. I had

(Deposition of R. Peterson.)

to go up to Portland and all around and it was not half enough. I should have had $100.00. It was for carfare and automobile hire and hotel bills and everything, as expenses.

Testifying on cross-examination concerning the voucher for $250.00 paid to John Grant, he said:

My crew left a day or two after I arrived at Portland. We [109] had a few off and on, one or two, probably once in a while, when there was any to be had, to straighten up things. I paid this $250.00 to John Grant. He is a boarding master. It is a business, like anything else, a thing we have to have. I paid that to him just before I sailed, to get a crew to go to sea with.

On redirect examination, he said:

When I left Aberdeen, my ship was supplied with stores for the voyage. While we were lying in port we used up some stores. We used some all the time, you know. I had my cook aboard. I had a mate on board and I had a sailor on board, and I had a second mate part of the time. When I got my new crew, they came just as soon as the cargo was in and I was ready to leave.

Q. This average adjustment, they have included the wages of 19 sailors for 21 days. Do you think that is right?

A. Well, that was up to the time they were coming into port, I suppose. I don't know, for 19 sailors. I never had 19 sailors. I may have, off and on that would count up to 19. But we only carry eight sailors in the crew. We paid wages to these sailors

(Deposition of R. Peterson.)

of twenty-five or thirty dollars. I am not sure. Something like that.

Witness excused.

Judge HANFORD.—I offer in evidence the vouchers used in the examination of the witness.

The several vouchers marked Libelant's Exhibit "A," attached to and returned with deposition. [110]

At a hearing before the Honorable EDWARD E. CUSHMAN, Judge, the following proceedings were had:

Depositions of Captain Peterson just referred to, with the exhibits therein referred to, were admitted in evidence.

Testimony of Arthur B. Hedges, for the Libelant.

ARTHUR B. HEDGES, a witness, called and sworn on behalf of the libelant, testified as follows:

My name is Arthur B. Hedges. I live at Portland, Oregon. I am an accountant at the present time; I am not permanently engaged— In the fall of 1910 I was cashier and local manager for Brown & McCabe. Their business was that of stevedores. I recall the circumstances of the barkentine "Jane L. Stanford" coming up the Columbia River to St. Johns for repairs. Brown & McCabe lightered her cargo so that she could go on the drydock. Brown & McCabe handled the disbursements of the expenses of that business. They acted for the captain and owners. I paid all the accounts as soon as they were

(Testimony of Arthur B. Hedges.)
approved by the master, and made up an account against the owners.

(Witness was handed the deposition of Captain Peterson, to which were annexed certain exhibits. Witness looked at exhibits, continuing:)

I recognize these papers. These papers are relating to the disbursements of the "Jane L. Stanford" at Portland. They are receipted bills. I recognize the signatures to those different papers. I was personally acquainted with Captain Albert Crowe. I am able to identify his signature. As far as I can recollect, he approved a majority of these bills for payment. I do not know for whom he acted; I cannot recollect; I should think the owners, but I cannot recollect; I do not know. I believe that Captain Crowe represented the San Francisco Board of Underwriters. I see Captain Peterson's signature on these bills. I recognize the signature. I paid these bills after they were approved by the [111] captain, always. I made out the bill of Brown & McCabe, which appears there containing a number of items. I made that out from the disbursement-book. I kept a memoranda-book called a disbursement-book, and this bill was made out from it. The items in that bill are the same as the voucher O. K.'d by Capt. Peterson. I made the payments by check. The majority of the materials bills I made in cash to the man that represented the firm; in case it was Anderson & Crowell, I would make it to Anderson & Crowell. Brown & McCabe's first bill was $5,443.15; and the other bill $2,723.17.

(Testimony of Arthur B. Hedges.)

Those were aggregate amounts actually paid out by Brown & McCabe. Of these items, $50.00 cash was furnished to Captain Peterson, also an item of $600.00, and another item of $1,500.00. These amounts were furnished to the captain and amounted to $2,150.00. I do not know what he did with that, or any of it. The captain paid some bills. I could not state the amount, nor could I specify the items. I could not state whether there are any items in Brown & McCabe's bill where I billed his items; I know all the bills paid by us were approved by the master and receipted for by the party who receipted the bill; I paid him a check. I paid to the parties who furnished services or materials all of that money, excepting the money that I gave to Capt. Petersen; we paid all the bills as stated here, and the amount paid to the Captain was a separate amount entirely. After these bills were paid, I made up this statement from the disbursement-book, drew a draft, which was approved by the captain, and then presented it to the bank and it was paid. This was a draft against the owners of the vessel. Brown & McCabe got their money on this draft. [112]

On cross-examination he said:

I am not employed by Brown & McCabe at the present time. I am field accountant for the O. W. R. & N. railroad. I am testifying from the papers and not from memory. I do not know anything about what these items were expended for, except as I got it from the bills themselves and from the O. K. of the captain. I do not know as to whether they were

(Testimony of Arthur B. Hedges.)

necessary expenditures or not, or whether they are items arising from this accident on the Grays Harbor bar.

Witness excused.

Testimony of E. ALEXANDER and ROBERT H. LEE, taken at San Francisco, California, on the 21st day of July, 1917:

Testimony of E. Alexander, for Libelant.

E. ALEXANDER, being called for the libelant, testified as follows:

I reside at Forty-eighth Avenue, San Francisco. My place of business is 112 Market Street, Thompson Building. My business is that of the average adjuster. I have been engaged in that business over ten years, in San Francisco. I made up a statement of general average on the "Jane L. Stanford" on the date of March 3, 1911. That had reference to damages received by her in October, 1910, on the Grays Harbor bar. Well, that shows the dates; I don't remember all the dates of all the items, just as it is made up. Any date there is from protests and legal documents.

(Witness is shown a book or document which is entitled "Statement of General Average, Barkentine 'Jane L. Stanford,'" and asked whether it is the statement of general average to which he referred.)

A. Yes, that is my signature at the end of it. **[113]**

(Witness' attention is called to pages 46 and 47 of the document and to the item entitled "Adjustment

(Testimony of E. Alexander.)

Committee receive their fee, $30.00.)

A. That committee is appointed by the Board of Marine Underwriters, who represent all the underwriters doing marine insurance business in San Francisco, and they are authorized and instructed to examine all statements of this character and to make a charge of $30 for doing that service—a committee of three underwriters. That charge is made under the rules and regulations of the board and is the usual and customary fee.

(Witness' attention is called to the item, "Adjuster receives adjustment fee, $100," and asked what that item is.)

A. That is for my services in drawing up this statement, and all the necessary work connected therewith. That is for drawing this statement of general average on the "Jane L. Stanford." That is a usual and reasonable fee for these services. I was going to say, of course, the fee varies with the size and amount of work to be done; in some cases it is small and some cases large. This fee, I may say also, is approved by this committee, who examine the adjustment. This adjustment committee for the underwriters always objects to any charge that is an overcharge, and they have approved this charge as being proper and reasonable for the service rendered.

(Witness' attention is called to item, "Printing adjustment, $30.80".)

A. That is the Dakin Publishing Company, who are printers, charged $30 for printing this adjust-

(Testimony of E. Alexander.)

ment. That page is a resume. Yes, I mean this page 46, showing the ship owner how he stands. **[114]**

(Witness' attention is called to item, "Settling agents receive commission for collecting and settling general average, $257.27," and is asked to explain that item.)

WITNESS.—This is a summary, of course, of the different items that appear over here in the former part of the statement. Now, this is under the head of "General Average." All the items that come under the head of this statement must be in accordance with the law; otherwise, there will be no claim against the underwriters. This item, amongst other items, is allowed by the law and custom of San Francisco.

Q. Are you referring to the last item on page 42?

A. Yes. 48 is the same thing. This summary need not be in it at all. This states what is claimable in general average according to law, and every item, therefore, in this column, must be substantiated by law, otherwise it falls to the ground. I am referring to the column headed "General Average" on the various pages ending with average adjustment on page 43. Now, on pages 46 to 49, I have a summary of the preceding pages. The disposition of all the previous items in the former part of the statement, showing what falls upon the ship owner, and showing what the net result will be to him of this adjustment, and the same in respect to the cargo owners and the other parties mentioned in that section.

(Testimony of E. Alexander.)

This $257.26 is a fee. That is payable to the shipowner, for different work; for attending to the general average matters and collecting contributions, as shown on page 42. It is a legal charge. The charge of $30.80 for printing adjustment is a reasonable and proper charge, of the Dakin Publishing Company in all cases. **[115]**

Mr. GRIFFITHS.—I will offer this statement of general average of the barkentine "Jane L. Stanford" in evidence as Libelant's Exhibit "A," Alexander.

Mr. RICHTER.—I make objection to the offer on the ground that no proper foundation is laid for the exhibit, irrelevant and incompetent.

Deposition of Robert H. Lee, for Libelant.

On Tuesday, July 24, 1917, the deposition of Robert H. Lee, on behalf of the libelant, was taken at San Francisco, Cal.

Mr. Lee testified as follows:

My name is Robert Henry Lee. My address is 112 Market Street; my home address is Palo Alto, California. I am in the wholesale lumber and shipping business. I am connected with the S. E. Slade Lumber Co. The S. E. Slade is the owner of the barkentine "Jane L. Stanford." The Slade Lumber Co. is a corporation. I am assistant secretary. I have held this office since prior to 1908. I am familiar with the receipts and expenditures of the vessels employed by the company, the vessels managed by the company.

(Deposition of Robert H. Lee.)

Mr. Lee then testified in detail and at length, tending to show in detail and at length upon direct cross and redirect examination, the fact that on the trip immediately preceding the accident in question the "Jane L. Stanford" earned a net profit of $12.64 per day. That on the voyage immediately following the one in which the accident happened, the "Jane L. Stanford" earned a net profit of $18.13 per day. That on the second voyage immediately following the one in which the accident happened, the "Jane L. Stanford" earned a net profit of $21.17 per day.

Testimony closed. **[116]**

Certificate of Honorable E. E. Cushman, Judge U. S. District Court, Re Statement of Evidence, etc.

State of Washington,
County of Pierce,—ss.

I, E. E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, and the Judge before whom the foregoing cause of R. Peterson, Libellant, vs. Grays Harbor Tugboat Company, Respondent, was heard and tried, do hereby certify that the matters and proceedings embodied in the foregoing transcript of testimony are matters and proceedings occurring in the said cause, and that the same are hereby made a part of the record; and I further certify that the said transcript, together with all of the exhibits and other written evidence on file in said cause, and attached to said transcript, contains all the facts material under the stipulation of the parties of the mat-

ters and proceedings heretofore occurring in the said cause, and not already a part of the record therein; that said transcript, with the exhibits attached thereto, are hereby made a part of the record in said cause, the clerk of this court being hereby instructed to attach all the exhibits hereto. Counsel for the respective parties being present and concurring herein, I have this day signed this Bill of Exceptions.

IN WITNESS WHEREOF I have hereunto set my hand this 22d day of November, A. D. 1917.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 19, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Refiled in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 22, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[117]**

In the District Court of the United States for the Western District of Washington, Southern Division.

IN ADMIRALTY—No. 858.

R. PETERSON,
Libelant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation, et al.,
Respondents.

Notice of Appeal.

To the Above-named Libelant, and to His Attorneys, Page, McCutcheon, Knight & Olney, and Ira A. Campbell, and E. C. Hanford, and C. H. Hanford:

You, and each of you, will please take notice that the respondent herein hereby appeals from the final decree made and entered herein on the 19th day of October, A. D. 1917, and from each and every adverse order and finding heretofore entered in said cause, to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said circuit in the city of San Francisco, in the State of California, in said circuit.

Dated at Hoquiam, Washington, November 19th, A. D. 1917.

MORGAN and BREWER,
Proctors for the Grays Harbor Tug Boat Company, Respondent and Appellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 22, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[118]**

I hereby acknowledge receipt of copy of the within Notice of Appeal, also Petition for Appeal, at Seattle, Washington, this 23d day of Nov., 1917.

C. H. HANFORD,
Proctor for Libelant.

Refiled in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 24, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[119]**

In the District Court of the United States for the Western District of Washington, Southern Division.

IN ADMIRALTY—No. 858.

R. PETERSON,

Libelant,

vs.

GRAYS HARBOR TUG BOAT COMPANY, a Corporation, et al.,

Respondent.

Assignment of Errors.

The respondent and appellant hereby assign errors in the rulings and proceedings of the Honorable District Court as follows:

1.

For that the Court refused to sustain its exceptions and objections to the libel:

2.

For that the Court erred in the findings of fact recited by it in its memorandum decision of April 16, 1917, for that such findings of fact are not in accord with the evidence in the cause, but are directly contradicted by the testimony in the cause and the evidentiary facts relating thereto, and particularly with reference to the finding that the captain of the respondent's tugboat, or the respondent itself, was negligent in any respect.

3.

For that the Court erred in its conclusions of law as [120] noted in said memorandum decision for

this, that the conclusions stated by the Court do not follow as a matter of law from the facts as found and recited by the Court in said memorandum decision.

4.

The trial court erred in its findings of fact upon which the judgment herein was based, that the captain of the respondent's tug was at fault in undertaking the tow at a time when it was entirely too rough upon the bar for the depth of water, as the preponderance of the evidence, and the evidence as a whole, showed the contrary.

5.

The trial court erred in holding as a matter of law that the burden in this case was upon the respondent to free itself from the blame by reason of the fact that it held as a matter of fact that the tow had been damaged by striking upon the bar while in charge of the tug, as this is contrary to the rule of law under such circumstances.

6.

The trial court erred in finding that the tug of the respondent was guilty of any negligence whatsoever that produced the damage, or any damage, to the tow, as the evidence was wholly to the contrary.

7.

The trial court erred in failing to find that the respondent and the tug exculpated the tug and those in charge of her wholly from any negligence under the circumstances shown by the evidence. **[121]**

8.

For that the Court erred in entering a final decree

in favor of the libelant and against the respondent in that such decree was not founded upon nor justified by any testimony in the cause, nor was such decree justified by the law flowing from the facts as found by the Court.

9.

The Court erred in that it ordered, adjudged and decreed that the libelant should recover against the appellant the sum of Nine Thousand One Hundred Sixty-nine and 70/100 ($9,169.70) Dollars, or should recover any sum at all.

10.

For that the Court erred in that it did not make a decree dismissing the libel with costs to this respondent in the District Court.

Dated at Hoquiam, Washington, November 19th, A. D. 1917.

MORGAN and BREWER,
Proctors for the Grays Harbor Tug Boat Company,
Respondent and Appellant.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 22, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [122]

In the District Court of the United States for the Western District of Washington, Southern Division.

IN ADMIRALTY—No. 858.

R. PETERSON,

Libelant,

GRAYS HARBOR TUG BOAT COMPANY, a Corporation, et al.,

Respondents.

Stipulation Re Transmission of Original Exhibits and That Same Need not be Printed.

It is hereby stipulated by and between the libelant by his proctor, C. H. Hanford, and the respondents by their proctors, Morgan and Brewer, that the original map, or maps, and chart, or charts of Grays Harbor may be sent to the United States Circuit Court of Appeals in lieu of copies of such map or maps, and chart, or charts, and that such maps and charts need not be printed in the record.

It is further stipulated that no exhibits other than the maps and charts need be sent to the Circuit Court of Appeals.

It is stipulated by the respondents and appellants that in view of the exclusion of the exhibits relating to accounting, that they make no point as to the sufficiency of the showing as to any items of account covered by such exhibits, or in fact any items of account, except the legal right of the libelant to be reimbursed for moneys paid as a commission for the

procuring of sailors, for moneys paid for the expenses of a general average, and for the allowance of interest for a five-year period. **[123]**

Dated and signed this 23d day of November, A. D. 1917.

C. H. HANFORD,
Proctor for Libelant and Appellee.
MORGAN and BREWER,
Proctors for Respondents and Appellants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 28, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[124]**

Certificate of Clerk U. S. District Court to Apostles on Appeal.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of R. Petersen, Libellant, vs. Grays Harbor Tug Boat Company, a Corporation, Respondent, No. 858, in said District Court, as required by praecipe of proctors for appellant filed and shown herein and as the originals thereof appear on file and of record in my office in said District at Tacoma.

I further certify and return that in accordance with stipulation of proctors for libellant and appel-

lee and for respondent and appellant filed in this court on the 28th day of November, 1917, and shown herein, I hereto attach and herewith transmit a map or chart of Grays Harbor, Washington, marked Libelant's Exhibit "A," G. H. Marsh, U. S. Commr., which is the only map or chart of Grays Harbor filed in said District Court in said cause.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellant herein for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return, 310 folios at 15¢ each $46.50

Certificate of Clerk to Transcript, 3 folios at 15¢ each and seal ..... .65

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 13th day of December, A. D. 1917.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy Clerk. **[125]**

[Endorsed]: No. 3093. United States Circuit Court of Appeals for the Ninth Circuit. Grays Harbor Tug Boat Company, a Corporation, Appellant, vs. R. Petersen, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed December 17, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

NO. 3093

United States

Circuit Court of Appeals

For the Ninth Circuit

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Appellant,

—vs.—

R. PETERSON,

Appellee.

Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

MORGAN and BREWER,
Hoquiam, Washingtton,
Proctors for Appellant.

NO. 3093

United States

Circuit Court of Appeals

For the Ninth Circuit

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Appellant,

—vs.—

R. PETERSON,

Appellee.

Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

MORGAN and BREWER,
Hoquiam, Washingtton,
Proctors for Appellant.

NO. 3093

United States

Circuit Court of Appeals

For the Ninth Circuit

GRAYS HARBOR TUG BOAT COMPANY, a Corporation,

Appellant,

—vs.—

R. PETERSON,

Appellee.

Brief of Appellant

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

STATEMENT.

This is a libel in personam for damages alleged to have been caused to the "Jane L. Stanford" by reason of striking on the Grays Harbor Bar, while in tow of one of the appellant's tugs. The "Jane L. Stanford" is a barkentine of 861 tons burden and at the time of the alleged striking was in command

of Captain R. Peterson, the libelant. She was in tow of the appellant's tug "Cudahy," then in command of Captain Chris Olsen.

The libel charged in general terms, negligence on behalf of the company in that Captain Olsen was inexperienced and was at the time of the accident intoxicated; that he had never towed a vessel through this channel before, and that he attempted to tow the vessel through it at a wrong state of the tide, and when the weather was too rough for the purpose. The charges of inexperience and intoxication and of not having towed through this channel before, were practically abandoned by the appellee during the course of the proceeding. Practically all questions of negligence were eliminated, except that

> "said master of respondent's said tug negligently and carelessly towed said barkentine to sea across said bar when the sea breakers on said bar were too heavy, and the depth of water on said bar too shallow to enable said barkentine to cross said bar in safety."

Captain Chris Olsen was the most experienced in point of length of service of the Grays Harbor Tug Boat Company's captains. He was a licensed master and had been master of a tow boat for 27 years. He had towed in and out over Grays Harbor Bar continuously for 20 years and off and on for

about 7 years. He had towed out several hundred vessels, at least (R-78).

He is described as follow:

"He was considered a capable navigator" (Johnson-90). "He was a first-class man, and I have always heard that he was one of the best tug boat captains on the coast" (Chicoine-94). "As a master of a tug boat I will say he was the best on the coast" (Davidson-98). "Captain Olsen is a capable captain or navigator. I would say that he was as good a navigator as I would want to pick up anywhere" (Sanborn-116).

Captain Olsen was familiar with the channel. The channel was not new. It had been used during the preceding summer since the previous June or July. During that time it had been used by Captain Olsen for towing dismantled vessels used as rock barges. Sometimes he would take one every day, sometimes two a day, and sometimes there would be two or three days that he would not have any (R-85). The average draught of these barges was 19 or 20 feet, and the tonnage of the ships was from 1200 to 1600 tons. They were a great deal larger ships than the "Stanford," some of them were more than twice the tonnage of the "Stanford" (R-89).

"The channel then used and now used was the 'South Channel.' The 'South Channel' had more water and was a better channel than the 'North Channel'" (Olsen-79). "The channel used was the proper channel" (Johnson-90). "It was the customary channel at that time for towing vessels of that depth. It was deeper than the 'North Channel'" (Sanborn-107). It had about 25 or 26 feet of water at that time (R. 115).

Soundings taken a few seconds before the vessel struck (Libelant-54) showed four fathoms and a half of water, or 27 feet. This is sufficient for a vessel drawing 20 feet 2 in. aft (R-81).

In traversing the "South Channel" a range was followed. The course was Southwest by West, but in traveling, the tug boat went by a range. The range was laid by the red buoy and the Lone Tree on Damon's Point. You got your range after passing the red buoy. The actual crossing of the bar would be probably four or five hundred yards from the red buoy (R-83). The outer red buoy was a mid-channel buoy. The actual crossing of the bar would take about 10 minutes from the time the tug gets on the bar until the tow goes over (R-98). After leaving the red channel buoy you could not turn around (R-62).

The bar is shifting sand; just sand with no obstructions. The shoal part of the channel is straight. It is described as follows:

"You approach the bar with deep water all the way and there is a ridge and you go off that ridge into deep water again. There is a ridge of sand at the mouth of the harbor and what they call the bar is the deepest place and you cross it at right angles so it is pretty straight. It takes about a minute to cross the bar, it is less than a thousand feet perhaps. The depth of the water approaching the bar we maintain at forty-five feet and it gradually shoals up to the bar and the shoalest part we call it about three or four casts of the lead, about as far as one can throw it. We get about three or four of these casts in the shallowest water and then we are out in deep water again. The shallowest water at that time was about twenty-five or twenty-six feet of water at that time, it all depends on the heighth of the tide, some use larger and some smaller. The last hour before high tide is the best time to cross the bar. If you have a good-sized vessel to take across you would usually take the last hour to cross" (Sanborn, R-115).

"The day was the 25th of October; the hour about 4:00 P. M." (Log, "Printer"-118).

"The wind was north-northwest, blowing a slight breeze" (Libellant-38). "It was what I call a full sail breeze" (Libelant-61). "Pretty stiff breeze" (Johnson for Libelant-73). "Passed over bar at 4:00 P. M., bar smooth, wind north-northwest, weather fine" (Log, "Printer," R-118).

"The sea outside the bar was not choppy. The swells outside were not especially heavy" (Libelant 61). "There was no heavy sea at that time, just swells, heavy swells" (Thompson for Libelant-71).

The bar was not breaking. It was what was called lumpy. The libelant says: "When the tow got where it could see the bar it was very lumpy. It was not breaking. There were large, heavy swells." "It was not choppy. It was not breaking outside" (Libelant-61). His mate says: "There was no heavy sea at that time, just swells, heavy swells. I know that just at that time several heavy swells came in. No sir, I can not say that I observed any heavy swells before that" (Thompson-71). "No sir, I could not say that I saw unusual swells" (Johnson-73). This is the testimony of the libelant's witnesses.

The testimony of respondent's witnesses was that there was no unusual conditions on he bar. They say: "The bar was not breaking on that day.

There was no sign of a break on. It was an ordinary northwest chuck" (Olsen, R-85). "It was not what we call smooth; nothing breaking and no large chop on. I passed right by her (Stanford) going out" (Captain Johnson, R-90). "There was no condition of the bar that day to warn a tug not to cross the bar" (Chicoine, R-93). The bar was not very rough. It looked like it was fairly good. There was nothing unusual about the look of the bar that would warn a tug boat captain not to go over (R-97). "There was no unusual condition about the bar that we observed as the 'Stanford' was going over" (Davidson, R-98).

On the morning of the 25th before taking the vessel to sea, the appellant's captain had gone down to the bar to observe its condition. He then returned to a point near the "Stanford" and there remained until in the afternoon of that day. Before towing out the appellee's vessel, he returned to the bar and again observed its condition and returning to the place where the vessel anchored proceeded with her to sea.

The tug "Daring" in charge of Captain H. K. Johnson and towing the schooner "Fred J. Wood" preceded the "Stanford" to sea, and returning Captain Johnson passed the "Cudahy" at the red buoy

400 or 500 yards from the bar and a few minutes before the "Cudahy" crossed the bar (R-91). The tug "Printer" in charge of Captain Erickson and towing the "Americana" also preceded the "Cudahy" and according to the log of the "Printer" crossed the bar at 4:00 P. M. Both of these masters were experienced men and had been towing over Grays Harbor bar for a number of years. They met with no difficulty (R-61).

In passing over the bar the channel was followed as nearly as possible (R-79). The Captain followed a range. The range was astern. And the master in watching the range was watching the vessel all the time (R-80). Four witnesses on the tug boat testified that they were watching the tow at all times while crossing the bar and observed nothing unusual connected with such crossing. There is no evidence that the tug boat deviated from the channel in the slightest degree.

Five witnesses testify that when a tow touches upon the bar the effect is immediately perceptible upon the tug; that the mast and the top hamper of the tow shake; that the tow line begins to pay out; that it sometimes is necessary to throw water on the tow line to keep it from burning, and in effect that it is practically impossible for the tow to touch with-

out that fact being detected upon the tug. *Four reputable witnesses, none of whom were at the time of testifying in the employ of the appellant,* each testify that they were watching the tow constantly during the time the "Stanford" crossed the bar, and that they observed no indication that she touched upon the bar.

The libelant's witnesses testify that at the moment of reaching the bar, the vessel was struck by *three extraordinary* heavy swells. They are described by the libelant himself as follows: "The bar generally was rough but just as we struck there were three heavy rollers came in, three extra heavy swells came in. We were right in them; had no chance to get out of them (R-54). I certainly did watch the bar. I had my glasses out as soon as I was able to see it. Yes, when I got so I could see the bar it was very lumpy. I mean when a very big swell comes in, when it breaks off the bar, when it breaks then I call it very rough; I could not say this bar was breaking, but it was very lumpy. large heavy swells. These three extraordinary heavy swells (came), that was when we struck. I noticed them coming. They come probably every two, three or four minutes. *These three heavy swells were breaking two or three minutes before they struck us. You bet they were*

breaking (-60). When we got over the bar there were swells as there generally are in the winter-time; was not choppy; was not breaking. No, the swells outside were not especially heavy, they were swells that we generally have in the winter time from the southwest; the wind was northwest" (R-61).

"The fact is, we *did* encounter three heavy swells right on the bar (R-62). We caught the swells almost abeam. We were in three of them before we finished; three of them had to pass us. We were in the trough of each one of them (R-62). It took us probably two or three minutes to pass through these three swells" (R-63). He also says: "Had soundings of considerable depth of water just a minute or two before we started over the bar. A couple of minutes after we had considerable deep water" (R-62). "Before we struck we got four and one-half fathoms" (R-63). "The report he gave me a few seconds before she struck was four fathoms and one-half" (R-54).

His mate says:

Q: "What caused you to strike?"

A: "The only thing I can say was the heavy swells rolling in over the bar at the time. They were not what you could call heavy seas, but heavy swells;

just the time it struck I could not exactly swear to it (R-69). There was no heavy sea at the time, just swells, heavy swells; that is my opinion (R-71). *I know that just at that time several swells came in. Yes, came in, and that we struck* (R-71). No sir; I can't say I observed any swells before that reached the ship" (R-71).

The "Stanford" was laden with lumber. For about twenty-three days prior to the time she went to sea, the "Stanford" had been at anchor in Grays Harbor near Sand Island. On the night of Sunday, October 16th, or in the morning of October 17th, (R-118) the libelant says between 12 and 1 o'clock, the "Stanford" dragging two anchors blew ashore on Sand Island. "There was a storm that Sunday night blowing pretty good from the southwest. The vessel went aground on the north side of the channel, opposite Westport. She dragged up on the beach at low tide" (R-73). "She was lying over in the morning when the crew turned out" (Johnson, Libelant-74). The wind was south-southwest. It was what was called a "blow." She went aground on Sand Island near there. (Libelant-59). The place was described as follows: "It was sandy bottom, as far as I know; it is all sandy, whatever comes out of the water shows nothing but a soft muddy sand" (Libel-

ant-64). "She went on the sandspit on Sand Island" (Libelant-68). "The place where the 'Stanford' went ashore was as bad as any in Grays Harbor" (Sanborn-119). "Sand Island on that side is supposed to be hard sand" (R-94). "The ground was sandy, hard sandy bottom" (R-106). "It seemed to be sand as far as could be seen at low tide" (R-99). The trial court gained the impression that the "Stanford" grounded on mud, but no witness testified to that effect. (The only reference to mud being the log of the "Printer" as follows: "Oct. 17, 6:00 A. M., 'Left Hoquiam for sea, towed boat Jane L. Stanford off mud to safe anchorage' "). All the witnesses testified that the "Stanford" went ashore on the hard sand on the southern end of Sand Island.

The morning of Monday, the 17th of October, was stormy, with a southeast wind. Captain Johnson of the Tug "Daring" first discovered the "Stanford" ashore on Sand Island. As soon as the tide floated her she commenced to pound. She pulled off hard. The "Daring" was the most powerful tug on Grays Harbor. It was described as follows: "The 'Daring' pulled her probably near an hour, or something like that." "It was pretty rough water. It is always rough on spits on a rolling swell." "A vessel the size of the 'Stanford' and laden with lumber and pounding on a sand, is going to damage herself."

"Her seams are going to open" (R-91). Captain Johnson says: "Yes, I say she was pounding on the bar. Yes, you take any vessel laying on a bar will pound, with the flood tide coming in. You need not tell me about the spits down there, I call tell you lots about it. I say the "Jane L. Stanford' was on a bar and was pounding; yes, sir; she had a list" (R-91). After pulling probably an hour, the "Daring" turned the "Stanford" over to the "Traveller," Captain Sanborn. Captain Sanborn had hold of her four or five hours. She came off quite hard. He observed her before she came off and she was apparently pounding. The "Daring" towed her off stern first and the "Traveller" took hold of her bow and held her while the "Stanford" got her anchors up (R-106). "One anchor laid in quite far in shoal water and we tried to hold him off from swinging all we could until he got hold of his anchor. I forget whether he had both anchors down or not, anyway one was quite foul. It was high water and he was right over his anchor" (R-107). Otto Rohme, witness for the respondent, testified that at this time the anchors were close to the vessel. When he first saw her she was hard aground, but when the tide came in she was working heavy on the sandspit. The water was rough inside the harbor when she went aground, very rough. When the tide came in she was thumping hard. It

pounded her a lot and shook her up (R-102).

When the vessel was placed upon drydock her injuries were described as follows: "She had apparently hit with her keel on sandy bottom; about thirty feet of the outer shoe and ten feet of the inner shoe on the keel were torn off the whole length, the whole after end of the vessel, extending to about one-third of her length; the vessel was all shaken in the seams; the butts along the bottom and all over the vessel were more or less started; the keel in several places on the places mentioned before, the pieces of the shoe split off and in some places cut in deep enough to take off or scalp off the keel; in the vicinity of the foremast, underneath the foremast on the port side there were two pretty deep cuts and the planks bruised and cut in about two and a quarter inches deep. The keel right opposite that place was slightly damaged, and the shore for a distance of about ten feet badly split up, and quite a portion of it gone. Right across the starboard side of the planks there was one bad bruise and a score of considerable length; these latter damages were fresh and had apparently been made by the vessel going upon sharp rocks; also places damaged along the keel to about within thirty feet of her heel; the stern post was found set about one-fourth of an inch in the ship's counter; rudder

not working true" (R-109 & 110).

All of these injuries could have been received, and it is more probable that they were received, when the vessel was ashore on Sand Island, October 17th, than by touching upon the bar on October 25th (R-91, 109, 110, 112, 119, 105).

She could not have received these injuries, particularly the cutting and scoring, on Grays Harbor bar (R-109, 111). She might have received the cuts and bruises by lying on her anchor (R-108).

"The 'Stanford' was due for the drydock for cleaning and painting" (Libelant-64). There was no drydock on Grays Harbor that would accommodate a vessel of this size (R-91).

ASSIGNMENTS OF ERROR.

The respondent and appellant hereby assign errors in the rulings and proceedings of the Honorable District Court as follows:

—1—

For that the Court refused to sustain its exceptions and objections to the libel.

—2—

For that the Court erred in the findings of fact recited by it in its memorandum decision of April 16, 1917, for that such findings of fact are not in accord with the evidence in the cause, but are di-

rectly contradicted by the testimony in the cause and the evidentiary facts relating thereto, and particularly with reference to the finding that the captain of the respondent's tugboat, or the respondent itself, was negligent in any respect.

—3—

For that the Court erred in its conclusions of law as noted in said memorandum decision for this, that the conclusions stated by the Court do not follow as a matter of law from the facts as found and recited by the Court in said memorandum decision.

—4—

The trial court erred in its findings of fact upon which the judgment herein was based, that the captain of the respondent's tug was at fault in undertaking the tow at a time when it was entirely too rough upon the bar for the depth of water, as the preponderance of the evidence, and the evidence as a whole, showed the contrary.

—5—

The trial court erred in holding as a matter of law that the burden in this case was upon the respondent to free itself from the blame by reason of the fact that it held as a matter of fact that the tow had been damaged by striking upon the bar while in charge of the tug, as this is contrary to the

rule of law under such circumstances.

—6—

The trial court erred in finding that the tug of the respondent was guilty of any negligence whatsoever that produced the damage, or any damage, to the tow, as the evidence was wholly to the contrary.

—7—

The trial court erred in failing to find that the respondent and the tug exculpated the tug and those in charge of her wholly from any negligence under the circumstances shown by the evidence.

—8—

For that the Court erred in entering a final decree in favor of the libelant and against the respondent in that such decree was not founded upon nor jutsified by any testimony in the cause, nor was such decree justified by the law flowing from the facts as found by the Court.

—9—

The Court erred in that it ordered, adjudged and decreed that the libelant should recover against the appellant the sum of Nine Thousand One Hundred Sixty-nine and 70/100 ($9,169.70) Dollars, or should recover any sum at all.

For that the Court erred in that it did not make a decree dismissing the libel with costs to this respondent in the District Court.

ARGUMENT AND AUTHORITIES.

The questions of the law involved are simple and in our view resolve themselves to two questions which we will discuss together. This case rests entirely upon the sufficiency of these circumstances, to charge the master and through him the owners with negligence, or, on the other hand, to exonerate him, or in any event, the owners, from blame. For this reason we have recited the facts with great particularity. The trial Court did not find, and of course from the evidence could not find, any positive proof of negligence on the part of the tug boat's master. The charges of incompetence and intemperance, of course, fell to the ground. There was no evidence that the hour selected was not the proper hour, but positive evidence to the contrary. There was no evidence that the vessel was out of the channel. The trial Court states his findings in that respect in these words:

> "It is not unlikely that the towing was undertaken too long a time prior to flood tide, or the 'Stanford' may have gotten out of the channel,

> but if so these facts are not made clearly to appear."

The trial Court, therefore, in order to hold the defendant liable was compelled to adopt, and did adopt, the doctrine of *res ipsa loquitor*, and states his conclusion in that respect in these words:

> "Under such circumstances the rule that damage to the tow does not ordinarily raise a presumption against the tug does not obtain, * * * and the burden shifts to the respondent to free itself from blame."

So that in our view this question narrows down to these specific points: First, as to whether or not the trial Court is correct in his conclusion as to the burden of proof; Second, this additional question which we claim to be pertinent and controlling which stated in the affirmative form is:

Even though the master of the vessel be found at fault in the particulars mentioned, *under the circumstances of this case* the appellant owners are not chargeable with his negligence, inasmuch as such fault if it existed was an error of judgment for which the owners would not be liable.

A tug is not a common carrier or an insurer of the tow.

As stated first by Justice Strong, repeated by Chief Justice Fuller, and quoted and approved by Justice Grey:

"An engagement to tow does not impose either an obligation to insure or the liability of common carriers. *The burden* is always on him who alleges the breach of such a contract to show either that there has been no attempt at performance or that there has been negligence or unskilfulness to his injury in the performance."

Unlike the case of common carriers, damages sustained by the tow does not ordinarily raise a presumption that the tug has been at fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

The "J. P. Donaldson" (1897, Jutice Gray).
167 U. S. 599-606;
42 Law. Ed. 292;

The "L. P. Dayton",
120 U. S. 337-353;
30 Law. Ed. 669;

The "Webb" (Justice Strong),
14 Wall. 406-418;
20 Law. Ed. 774;

The "William E. Gladwish (2nd. Cir.)
196 Fed. 490;

The "Kunkle Bros."
211 Fed. 542-543;

The "Patrick McGuirl, (2nd. Cir.)
200 Fed. 570;

The "Winnie" (2nd. Cir.)
149 Fed. 726;

The "W. H. Simpson" (7th Cir.)
80 Fed. 153.

There is no presumption of negligence from the fact of disaster and the burden of proof is put upon the Libellant to satisfy the Court upon the evidence presented and upon the reasonable probabilities of the case, that the tug was guilty of the fault charged.

The "J. P. Donaldson",
167 U. S. 603;
42 Law. Ed. 292;

The "W. H. Simpson",
80 Fed. 153;

The "Winnie" (2nd. Cir.)
149 Fed. 725;

The "Patrick McGuirl" (2nd. Cir.)
200 Fed. 571;

This is of course so well established that citation seems superfluous. However, it is claimed that there is an exception to the rule.

Of late some of the District Courts and one of the Circuits have so honored the rule in the breach and the exception in the observance as to reduce the rule to a shadow.

If this rule is to have any force it should be applied. If it is to be whittled away by exception to

such a point that its practical application is impossible, then it should be abandoned.

The true application of rule and exception are well stated by this Court in the Pederson case, as follows:

> "In cases where *no questions are raised as to what caused the accident or injury* and the circumstances are of such a character as to show that the thing which did happen would not have occurred unless there was negligence on the part of the person having charge and control of such thing, then the presumption contended for (that the happening of the accident raised a presumption of negligence) would apply."
>
> Pederson vs. John D. Spreckles & Bros. Co., 87 Fed. 941.

Let us see how the trial Court applies these rules:

> "That the towing was undertaken too long prior to flood tide, or the 'Stanford' may have gotten out of the channel, but if so these facts are not made clearly to appear."
>
> "But whether the striking was caused by one reason or the other, the captain was negligent." (Opinion R. 39).

Again:—

"Grays Harbor was the home port of the tug. It was the captain's duty to know the depth of water and the channel."

In other words:—

(a) Striking on Grays Harbor Bar indicates that the water is too shallow, or the vessel is out of the channel.

(b) The Captain is bound to know both facts.

Therefore, any striking on Grays Harbor Bar is negligence for which the Grays Harbor Tug Boat Co. is liable.

What difference in practical effect is there between this specuous argument and saying in so many words:

"The tug boat is an insurer of the safety of its tow in crossing Grays Harbor Bar," and

"Any touching of the tow on Grays Harbor Bar creates a presumption of negligence on the part of the Grays Harbor Tug Boat Co."

It is not an uncommon thing for vessels to touch on Grays Harbor Bar. It is one of the perils attendant upon navigating these waters, and has so been recognized for years. It does not appear from the record, except as jetties are mentioned therein, but the fact is, the Government has expended millions of dollars in an effort to improve Grays Harbor Bar. Its navigation has always been and is now perilous. Heretofore, such peril has been shared by tug and tow alike, but now, if this decision is to stand, the

peril is shifted by a word, by a mere *ipse dixite* to the Grays Harbor Tug Boat Co., and it becomes for all practical purposes an insurer of every vessel it assumes to tow across the bar.

We can not believe that this is the law.

The trial Court completely ignores this other well established rule so well expressed by Justice Strong in "The Webb":

> "The contract (to tow) requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

"The Webb",
14 Wall. 406;
20 Law. Ed. 775;

The "W. H. Simpson" (7th Cir.),
80 Fed. 153;

The "Samuel Bouker, D. C.,"
141 Fed. 480;

The "Winnie" (2nd. Cir.),
149 Fed. 725;

The "Oak" (4th Cir.),
152 Fed. 973;

Pederson vs. John D. Spreckles Co., (9th Cir.)
87 Fed. 942.

This rule too is so well established that citation is a sort of affront to the Court. Applying the rule to this case, in what respect can it be said that

Captain Olsen failed to act in a careful and prudent manner? He had grown grey in the service of the Tug Boat Co. He was, as stated by the Libellant himself, supposed to "know more about that (the channel) than anybody else." He twice went down to the bar to look at it before towing the Libellant across. Two other grizzled veterans in the service towed out ahead of him safely, the bar was not rough. There was nothing to warn him of any dangerous condition, the weather fine, wind northwest, bar smooth. The Libellant had his sailors aloft spreading all his available canvas. He kept the channel carefully, observed the vessel minutely while crossing and was astonished to learn after the crossing that the vessel had touched. In what respect can it be said that he has not "carried out his undertaking with that degree of caution and skill which prudent navigators employ?" No man hath testified against him. No man has said his conduct was otherwise than prudent and skilful. He is damned by a presumption, and just such a presumption as the Supreme Court often and the other Courts many times have said could not be indulged.

The question of Captain Olsen's conduct, his prudence and foresight, is a practical one.

As said by Judge Brown in "The Allie & Evie," 24 Fed. 745:—

> "In whatever form the question comes up, whether as to seaworthiness, adequacy for the work or time of starting, it is a practical question of reasonable prudence and judgment * * * there is no other final criterion than the judgment of practical men versed in the business and the customs and usages of the time and place."

So in this case, the time and place for crossing Grays Harbor Bar, the condition of tide, sea and weather, are questions for the judgment of practical men skilled in this business.

But no, the trial Court sitting in his chambers at Tacoma, with no knowledge of the perils of the seas, certainly with no knowledge of the dangers of navigation of Grays Harbor Bar, condemns this veteran of the seas, brands him with negligence and unskilfulness, and mulcts his employers in more than $9,000 and all upon the testimony of no man, but rather upon a presumption from the happenings of the accident.

The truth of this matter is that the injury if it occurred on Grays Harbor Bar was one well described by this Court with reference to another,—

> "The misfortune which befell the Schooner is to be attributed not to faulty navigation, but to the inherent dangers of the undertaking."

It has been recently said:

> "A standard of prudent conduct for the handling of a tow in a storm at sea set up after the event by one not present must be regarded with the greatest caution."

Olsen vs. Luckenback, 238 Fed. 238;

and that applies with the greatest force to the case at bar.

The trial Court ignores another well established rule, that is,—

> "Where the master of a tug is an experienced and competent man * * * a mere error of judgment on his part will not render the tug liable for the loss of her tow."

The "William E. Gladwish," (2nd. Cir.) 196 Fed. 490;

The "Garden City," (6th Cir.), 127 Fed. 298;

The "E. Luckenback," (2nd. Cir.), 113 Fed. 1017;

The "Battler," (3rd. Cir.), 72 Fed. 537;

Applying this rule to the facts of this case. The trial Court did not find what the cause of the accident on the bar, if any, was. This matter is left wholly in conjecture. There is no doubt that there was sufficient water on the bar to enable the "Stanford" to cross without danger in a perfectly calm sea. She had more than six feet of water under her a "few seconds" before she struck. She was in the channel then. If she struck it was on account of

the swells, that is, of the action and conditions of the seas at that particular time and place. A miscalculation on the part of Captain Olsen *as to the size of the swells, the direction and force of the prevailing seas*, would constitute a mere error of judgment for which the appelant would not be liable. These conditions are changing conditions. They change from day to day, from hour to hour. The channel as such is reasonably fixed. A master may know within reasonable limits what the height of the tide will be, but no man can state with certainty what will be the condition of the seas on Grays Harbor Bar. At times a child might cross with a skiff, at other times the stoutest vessel dare not cross. To make a miscalculation as to the height and force of these swells is to make *an error of judgment*, and not a *mistake of fact*, which seems to be the distinction made by the Courts.

The Libellant and his witnesses testify that just at the moment of crossing, the "Stanford" was met by *three extraordinary swells*. If this is true, it shows a changed condition on the bar at that moment. True, the trial Court disbelieves this testimony and disregards its effect. If this testimony is true, surely such a change in circumstances would constitute a peril of the seas for which the appellant could not be held responsible.

We then have this curious situation: In order to enable the Libellant to recover, his testimony and that of his witnesses must be disregarded, in fact, held to be false testimony.

If the testimony of Libellant is true and three extraordinary waves arrived just at this moment, then, indeed, the fault of Captain Olsen was a mere error of judgment for which appellant could not be held.

There is another matter which seems to us to be decisive of this case:

Ten days before the "Stanford" crosed the bar, she was admittedly ashore on Sand Island. She inevitably received injuries. She lay over on her side, she pounded on the sand. Her seams must start.

Who can say that she did not receive all, or the greater part, of her injuries there? She was due to go on drydock anyway. There was none on Grays Harbor. If she received such injuries on the sandspit, she must be repaired. She *must* reach the Columbia River. The fact that such voyage might be dangerous would not help the matter. *She had to reach a drydock on the Columbia River*, or lay in Grays Harbor and rot.

After the sandspit experience the crew mutinied and left the ship. A new crew was obtained which also deserted as soon as they reached Portland. The ship was lumber laden and could not sink. While

such an undertaking was difficult it was not particularly dangerous as the event showed. The master had only to reach Columbia River Light some 60 miles away. It is to be remembered she *must reach the Columbia.* All these are pertinent facts going to show that these injuries were received on Sand Island and not on Grays Harbor Bar.

Who can say that these injuries were not received there? The burden of proof was as much on the appellee to show that the injuries received were caused by the vessel touching on the bar, as it was to show that it touched on the bar at all. That is, it had the burden of showing not only that the vessel touched, but also that such touching resulted in the injuries for which we are charged. This it not only did not do, but we were able to show that such injuries were received elsewhere. These injuries could not have been received on Grays Harbor bar. Some of the chief of them consisted of cuts and bruises far up on the starboard bow, and across on the port bow. As shown by the testimony, this could not happen on sand such as that of which the bar consists. It is suggested by the trial Court that perhaps while in the trough of the sea she laid over sufficiently to strike her starboard bow on the bar. This illustrates the perils of a landsman specu-

lating on matters pertaining to the sea. To do this she would have to lie over at an angle of 45 degrees. No such maneuver has been testified to or suggested. Moreover, had she ever gotten in such a position and struck heavily on the bar sufficient to bruise her planking, she would have been wrecked right there and then. A heavily laden vessel is not built to resist such strains. A sailor, any sailor, would laugh at such a thing. Of course Captain Sanborn is correct when he says she could not receive such injuries as these on Grays Harbor Bar.

If from all these things the Court is unable to say what, if any, injuries were received on the bar, on what theory can the appellant be held for any part of the cost of repair?

We respectfully represent that upon all the testimony the Libellant was not entitled to recover and we ask the Court to reverse the cause, direct its dismissal and grant us our costs.

Among the items allowed by the Court was one of $50.00 allowed to the Libellant for "personal meals, carfare, etc.," while the vessel was lying in drydock. The captain was allowed his wages and captain and crew living expenses. (R. 46). Also, an item was allowed of $250.00, paid to John Grant as commission for obtaining a new crew, the old one

having deserted on arrival in Portland. The Libellant calls this "blood money."

The expenses of a general average presented in this form and without any testimony except as to the fact of payment, were allowed by the trial Court in the sum of $160.80.

This cause was begun in 1910. It was allowed to hibernate by the Libellant until 1917, when it was brought on for hearing. The Court refused to allow interest for the full term, but did allow interest for five years. We submit that interest should have been allowed, if at all, from the date of the trial Court's opinion on the merits at which time liability became fixed for the first time.

If the trial Court should by any chance find that there was liability, we respectfully call the Court's attention to these improper items.

Respectfully submitted,

MORGAN & BREWER,

For Appellant.

10

No. 3093

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GRAYS HARBOR TUG BOAT COMPANY
(a corporation),

Appellant,

vs.

R. PETERSEN,

Appellee.

BRIEF FOR APPELLEE

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PERNAU-WALSH PRINTING CO.

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BRIEF FOR APPELLEE

STATEMENT.

The general facts of the case.

This is a suit *in personam* against the appellant for damages. The general facts of the case are as follows:

On the 5th day of October, 1910, the barkentine, "Jane L. Stanford," having on board a full cargo of more than one million feet of lumber, was at Aberdeen, Grays Harbor, ready to proceed on a voyage to Australia and needing assistance of a tug to cross the bar which obstructs the entrance to Grays Harbor. Without any special contract therefor, the appellant furnished a tug which towed the barkentine to the vicinity of the bar, but, conditions being unfavorable for crossing it safely, took her to anchorage within

the harbor where she remained, storm-bound, three weeks. After the storm had abated, the steam tug "Cudihy," owned and operated by the appellant, towed the barkentine out to sea, but, in crossing it, she struck hard on the bar, whereby she was so badly injured that it was necessary for her to go into the Columbia River and to a drydock near Portland where she was repaired. This suit was commenced in December, 1910, by the master of the barkentine, as representative of the owners of the ship and cargo. Honorable Edward E. Cushman, the district judge before whom the case was tried, rendered two written decisions: one on the main question as to the right of the appellee to recover damages (Ap. 26), and the other assessing the damages (Ap. 41).

The damages awarded include cost of repairs, necessary expenses incidental to the mishap, demurrage, and interest on the amount of the cash outlay at 6 per cent. per annum for only five of the seven years that intervened between the time of the injury and the date of the decree.

By the stipulations (Ap. 50, 140) and the assignment of errors (Ap. 137), the controversy to be determined by this court is restricted to the main question as to the appellant's liability for any damages and three items of expense and the interest allowed by the trial court.

The particular facts of the case.

(1) It is apparent from all the evidence, and a well-known fact, that there is a bar at the entrance to Grays

Harbor which can be passed by vessels of deep draft only through certain channels, so that knowledge and skill of a pilot is essential to the safety of such a vessel in entering or going out.

(2) When loaded for the voyage in question, the draft of the "Jane L. Stanford" was 19 feet and 10 inches forward and 20 feet and 2 inches aft (Ap. 52).

(3) After leaving her loading berth, the ship was storm-bound inside of the harbor three weeks. The ocean cannot become smooth immediately after a tempest; necessarily, there will be rolling billows for a considerable time and, in fact, the ship encountered three great swells right on the bar (Ap. 54, 60).

(4) At the time of the mishap, the depth of water on the crest of the bar was not more than 22 feet, so that if the sea had been smooth there would have been less than two feet of water under the ship's keel. The last soundings taken by the appellee before the ship struck the bar showed four and one-half fathoms on the sounding line (Ap. 54). Allowance must be made for two conditions. First: the bar is not flat—the water shoals toward the top. This is proved by the fact that four and one-half fathoms was the least depth of water found. A preceding cast of the line showed seven fathoms (Ap. 55), and two minutes after striking on the bar the ship was in deep water. Therefore, it is apparent that when the reading of the sounding line was four and one-half fathoms the sinker rested on an incline and not on the highest part of the bar. Second: an exact measurement cannot be made in rough water. Waves wet the line higher than when

soundings are taken in smooth water. It is usual to allow from two to five feet for that condition (Ap. 54). In his opinion, Judge Cushman made a note of these conditions and he also noted, as a significant fact, that, although it was shown that soundings were taken on the tug, there was no evidence as to what they showed (Ap. 30-1).

(5) Before taking the barkentine in tow, the "Cudihy" made two reconnaissances of the bar. Finding conditions unfavorable in the morning, she came back to where the barkentine was anchored and made that report to Captain Petersen (Ap. 53, 59). At 1 P. M. she went for a second view. Then Captain Olson, her master, deemed the bar "passable" (Ap. 59), although he appears to have observed that there was a northwest wind and that swells were coming from the *west north* (Ap. 84).

(6) The "Cudihy," with the barkentine in tow, started at 2:30 P. M. and was at the red buoy at 3:45 P. M. (Ap. 53). That buoy is 400 or 500 yards inside the bar (Ap. 83). Fifteen minutes after passing the buoy the barkentine bumped on the bar, so it was 4 P. M. and two hours before high tide when that occurred (Ap. 54). This is confirmed by Captain Olson's testimony that the tide had been flooding one hour when he looked at the bar the second time (Ap. 86). Captain Petersen says definitely that this was at 1 P. M. (Ap. 53); Captain Olson's testimony in this regard is indefinite and appellant is not, of course, entitled to the benefit of the doubt, especially since Captain Olson does not positively contradict Captain

Petersen's precise statement of the time. By any reckoning that can be made from all the evidence the tide had been flooding not more than four hours before the time when the "Stanford" was on the bar, and this time (two hours before flood) was not the most favorable stage of the tide for crossing the bar, and Captain Olson knew that it was not (Ap. 86).

(7) At the time of crossing the bar the dangerous conditions were obvious. The sea was rough and lumpy, swells were rolling (Ap. 57), there was a northwest wind, and it was two hours before high tide. Warning was given by the whistle of another tug which crossed with a lighter vessel in tow ahead of the "Cudihy" when she was at the red buoy (testimony of Johnson, witness for the appellant (Ap. 92). It is admitted by the pleadings that there was a heavy swell and sea breaking on the bar (Ap. 14).

(8) Captain Olson took upon himself the full responsibility of a bar pilot. Instead of consulting with Captain Petersen, he peremptorily ordered him to heave up the barkentine's anchor and grab the tow line (Ap. 60), and he chose as the route for crossing the bar a channel with which Captain Petersen was not acquainted, he having never been through that channel, although he had been navigating in and out of Grays Harbor for six years (Ap. 53, 62). That channel was not buoyed (Ap. 62, 83). The best known channel was marked straight throughout (Ap. 82).

(9) The three big swells came against the barkentine abeam and she was in the trough of the sea between them (Ap. 62). She bumped hard twice—first aft,

then forward (Ap. 61), as a heavily laden vessel would do rolling and pitching in a valley of water between billows.

(10) That the barkentine did strike on the bar is proved by the testimony of Captain Petersen above cited and by the testimony of Thompson, her second mate (Ap. 69, 71), Fred Johnson (Ap. 72), and Mrs. Petersen (Ap. 77), and proved conclusively by the effect on the ship. Although she had been on the beach while waiting in the harbor, she was tight until she struck on the bar. Immediately afterwards her pumps were sounded and then the water in her was only eight inches, which was normal; twenty minutes afterwards there were twenty inches (Ap. 55). As soon as sails could be set, all hands, except one man required as lookout, were ordered to work her two pumps. She then had forty-two inches of water in her and it was necessary to keep both pumps working to discharge the continued inflow. That the ship was very seriously injured became apparent when she was put into the dry-dock (testimony of Captain Crowe, Ap. 74, 77).

(11) By reason of failing to discover by the first sounding of the pumps that the ship was leaking, Captain Petersen did not inform the captain of the "Cudihy" that his ship was damaged, but did tell him that she had struck on the bar and requested him to notify the appellant of that fact (Ap. 55, 87, 88).

(12) The foregoing statements are in harmony with the decision on the merits rendered by Judge Cushman, and, as he gave careful consideration to every detail of the case, we invoke the rule that this court

will not disturb the findings of a trial court without convincing proof of error.

It is to be noted that the testimony quoted in the opinion differs from what is contained in the abstract of testimony in the printed apostles. That circumstance is explainable by the fact that what the record contains is only a condensed abstract.

BRIEF OF THE ARGUMENT.

The law applied to the facts of this case.

Such facts being established, the legal obligation of the owner of the "Cudihy" to render compensation for the recovery is incontestable. The decision to be rendered must be governed by legal principles that are, in legal parlance, deemed settled law.

When there is no special contract to be considered and the master of a tug assumes responsibility without consulting the master of a vessel to be towed as to any of the details of the time or manner of performing a towage service, it is his right and duty to have and exercise complete command of both vessels and to perform the towage service with the knowledge, skill and prudence necessary for safety.

The Quickstep, 9 Wall. 665, 19 L. Ed. 767;
The Margaret, 94 U. S. 494, 496, 24 L. Ed. 146;
The Fort George, 183 Fed. 731, 106 C. C. A. 169;
The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494;
Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477.

In towing a ship out of a harbor obstructed at its entrance by a bar, the master of the tug must know the ship's draft and all the conditions of weather, tides, currents, channels and peculiarities of the bar essential for a bar pilot to know, and for him, either through ignorance or carelessness, to tow a ship out of safety into a dangerous situation on the bar when he knows, or should know, that the conditions are in any respect such as to expose the ship to peril, is wrongful and for any injury to the ship resulting from such wrong the owner of the tug is, by the rule of respondeat superior, responsible.

The Margaret, 94 U. S. 494;

Gilchrist Trans. Co. c. Great Lakes T. Co., 237 Fed. 432 at 434;

Cons. Coal Co. v. Knickerbocker Steam Towage Co., 200 Fed. 840;

The Fort George, 183 Fed. 731;

Winslow v. Thompson, 134 Fed. 546;

The Inca, 130 Fed. 36.

This rule in its utmost rigor was enforced by this court in the case of

Humboldt Lumber Manufacturers' Assn. v. Christopherson, 73 Fed. 239.

The fallacies in appellant's argument.

Aside from the objections to certain items in the damages (which we propose to take up in the last part of this brief), appellant's attack upon the judgment of the trial court is directed to three points:

(1) That the law does not under the circumstances of this case recognize presumption of negligence against a tug, but the burden is always upon libelant to prove the same by positive evidence;

(2) That the captain of the "Cudihy" was guilty of mere error in judgment and not of fault;

(3) That the injuries were not received by the "Jane L. Stanford" upon Grays Harbor bar at all.

The answer to these contentions is given, we believe, in our argument foregoing, but some further consideration of them in the order of appellant's treatment may not be out of place.

1.

Appellant's cases are all to the point that a tug is not a common carrier or an insurer of the tow (which no one disputes), and that *ordinarily* damages sustained by the tow do no raise a presumption that the tug has been at fault (which likewise no one disputes). The learned judge below expressly recognizes this rule (Ap. 40), and, indeed, specifically refers to the case chiefly relied upon by appellant, viz., *The J. P. Donaldson,* 167 U. S. 599. But the rule is not that the presumption *never applies,* but that it *ordinarily* does not apply. And the fact that it is sometimes recognized by the law is shown by the very cases cited by appellant itself on pages 22 and 23 of its brief. The language of the second paragraph on page 22 of appellant's brief is, though not in quotations, a verbatim excerpt from *The J. P. Donaldson,* and says merely that the presumption *ordinarily* does not apply.

In

The L. P. Dayton, 120 U. S. 337, 30 L. Ed. 669,

the Supreme Court, after referring to the usual rule that a tug is not an insurer of the safety of the tow (which for ordinary cases is not disputed by the trial court or by ourselves here), says:

> "In some cases the facts of the collision, as admitted in the pleadings, might constitute a prima facie case of negligence, which would impose upon the tug the duty of explanation and exoneration; * * *"

though it happened that the court found no such presumption in that particular case.

In

The Webb, 14 Wall. 406, 20 L. Ed. 774,

the Supreme Court says:

> "But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."

In

The Kunkle Bros., 211 Fed. 542,

again the statement is simply that *ordinarily* the presumption does not apply. Appellant's other cases (pages 22 and 23 of its brief) are simply statements of the general rule and do not dispute that it has exceptions.

That there are exceptions is settled law (too well settled for appellant to question, though it may rail against it—brief, pp. 23-6), as shown by the cases cited by Judge Cushman (Ap. 40), by the reservations

in *The J. P. Donaldson, The L. P. Dayton, The Webb,* and *The Kunkle Bros.,* supra, referred to by appellant itself and by the following further cases:

The Delaware, 29 Fed. 797;

The Genessee, 138 Fed. 549.

The opinion of the trial judge (Ap. 40) was thus not a denial of the ordinary rule, but an express recognition of it, followed by the statement that this was one of those cases where the burden of proof shifts in view of the fact that Grays Harbor was the home port of the "Cudihy," so that it was "the captain's duty to know the depth of water in the channel and the effect thereon of the sea running at the time," and that—

> "Nothing is shown to have existed or transpired but what the captain of the tug was bound to have known and anticipated; nor did the 'Stanford' do anything to impede or interfere in any way with the safe performance of the towage service nor is anything of the kind even suggested" (Ap. 39-40).

The charge of "specious argument," made on pages 24 and 25 of appellant's brief against the learned judge of the trial court, is built upon a mangling of the opinion. In context the opinion does not say that the mere striking of the vessel on the bar is proof of negligence; but rather, "I find that the captain of the tug was in fault in undertaking the tow at a time when it was entirely too rough upon the bar for the depth of water" (Ap. 39). The court based this finding as to roughness of the bar and depth of water there on a review and consideration of the evidence

set out just before the finding (Ap. 39 and preceding pages). Indeed, the answer itself (Ap. 14), as has been so often noted, admits the bar to have been rough and, for that matter, would fain have had it rough enough to provide the tug the defense of perils of the sea (Ap. 14). With reference to the finding of insufficient depth of water, the court noted the draught of the "Stanford" (Ap. 27) and her soundings (Ap. 30) and the fact that, although soundings were taken upon the tug, evidence was not introduced of what they showed (Ap. 31). Having thus considered the evidence and upon such consideration found that the tug was negligent in crossing the bar when it was too rough and the water too shallow, the court then states, and very properly, that Grays Harbor being the home port of the tug and her master being consequently charged with knowledge of channels and tides, it was immaterial whether the insufficiency of depth where the "Stanford" struck was due to the state of the tide or to deviation from the channel. The bar where the vessel struck bottom *was* too shallow for the towage of the "Stanford" in heavy swells and breaking seas. That is the finding on the evidence. Determination as to whether the inadequate depth of water should be attributed to state of tide or missing of channel was unnecessary; it was one or the other, and for mishap flowing from ignorance of tides or of channels the captain was, in his home waters, responsible.

Apart altogether, however, from any presumption, Captain Olson stands affirmatively convicted of negli-

gence. He took the "Stanford" (a sailing vessel committed to his sole care) from a safe anchorage in his home port to a bar where "there was a heavy swell and sea breaking," as admitted by the answer (Ap. 14), the roughest bar which Captain Petersen (who had been sailing out of Grays Harbor six years) had ever crossed with a sailing vessel (Ap. 57). He chose a time two hours before the flood (see the earlier pages of this brief), knowing that this was not the most favorable stage of the tide for crossing (Ap. 86). He went out through an unbuoyed channel (Ap. 62, 83) when the best known channel was marked straight throughout (Ap. 82). The depth of water on the crest of the bar was not more than 22 feet, so that even if the sea had been smooth there would have been less than two feet of water under the "Stanford's" keel (see preceding pages of this brief). Captain Olson was charged with knowledge of these conditions (*The Margaret,* 94 U. S. 494, and other cases cited, supra, and in the opinion of the court below—Ap. 39, 40). He persisted, nevertheless, in going on, though amply forewarned of peril by the whistle of one of appellant's own tugs preceding him (with a vessel of lighter draught) whose captain, being on the bar, had even better opportunity than he to know its condition and thought there was "too much swell on" (Ap. 92).

Appellant would have the court find that the damaging of the "Stanford" amid these manifold elements of danger was due to mere error of judgment on the part of the "Cudihy's" master. This is the second point in appellant's brief (p. 21) to which consideration may next be given.

2.

It is asserted that the owner of a tug is not liable for damage to a tow from mere error of judgment on the part of her master. That is a general statement of a general rule, which, however, is not applicable to the facts of this case. For there is a clear distinction between mere error of judgment in a crisis or emergency and positive wrong-doing in taking a ship out of safety and exposing her to obvious danger.

The cases cited by appellant (brief, 29), with the possible exception of *The E. Luckenbach* (113 Fed. 1017), which is a brief memorandum decision, belong to the former category.

Thus, in

The William E. Gladwish, 196 Fed. 490,

the tug was overtaken during the service by a "sudden squall" (196 Fed. at 491).

In

The Garden City, 127 Fed. 298,

the towage began in such fair weather that it was not imprudent to leave, but, in course of the trip, the wind "became so severe and the sea so rough that the steamer was unable to hold her course and was blown around. It became apparent that the vessels could not proceed, but must seek shelter. *In this emergency,* the question was presented to the sound discretion of the master" etc. (127 Fed. at 301—italics ours).

In

The Battler, 72 Fed. 537,

"the catastrophe was occasioned by a storm of excep-

tional violence and of sudden occurrence" (72 Fed. at 541).

Captain Olson did not decide *in an emergency* to take the "Stanford" over Grays Harbor bar, and thus commit an error of judgment *in a crisis*. On the contrary, as a bar pilot in his home waters, charged with knowledge of winds, tides, depth of water, draught of towed vessel and all such relevant conditions and the probable effects thereof and unhurried by pressure of time, he towed the "Stanford" from protected anchorage to and across a bar of heavy swells and breaking seas (Answer, Ap. 14), and this against the warning whistle of the master of another tug belonging to appellant who was in a better position to know the peril of the bar (Ap. 92). The rule of law applicable to such a situation is not found in the crisis and emergency cases cited by appellant, but in

The Margaret, 94 U. S. 494; 24 L. Ed. 146,

wherein the Supreme Court of the United States said:

> "The Port of Racine was the home port of the tug. She was bound to know the channel, how to reach it and whether, in the state of the wind and water, it was safe and proper to make the attempt to come in with her tow. If it were not, she should have advised waiting for a more favorable condition of things. She gave no note of warning. If what occurred was inevitable, she should have forecasted it, and refused to proceed. * * *
>
> *"Conceding that the mode of entering the harbor by the tug was the best under the circumstances, and the disaster thereafter inevitable, then the effort showed a clear want of judgment. As before remarked, she should have known this, and governed herself accordingly. Her conduct, in this view, was more than an error. It was a fault; and*

upon this ground she should be condemned." (Italics ours.)

And see also the other cases cited with *The Margaret* at page 8, supra, of this brief.

In the light of the foregoing considerations, the sarcasm directed by appellant at the trial judge at page 28 of its brief, and again at page 33, becomes as futile as it is unworthy.

3.

At page 31 of its brief, appellant begins a preposterous theory that the "Stanford" did not strike on the bar; that all her injuries were caused by pounding on rocks or lying on her anchors when she was driven by a storm upon the beach in the harbor ten days prior to being towed out to sea; that she was then so badly damaged that it was necessary for her to go into the Columbia River to be drydocked; that her damaged condition was concealed and her captain fraudulently contrived to be towed out to sea intending to make it appear that the damage occurred in crossing the bar and to saddle the expense of docking and repairs upon the tug. This theory is not advanced boldly, but insinuatingly, in the question, "Who can say that she did not receive all, or the greater part, of her injuries there?" That question is distinctly answered by the positive testimony of Captain Petersen that the ship did not pound on the beach (Ap. 58, 65, 68), that she did not lie on her anchors (Ap. 67), and that she

did not leak nor take in a quarter of an inch of water from the time when she was loaded until after striking on the bar (Ap. 66). Mrs. Petersen testified that the ship did not pound on the beach (Ap. 77). Fred Johnson testified that the ship dragged her two anchors, dragged upon the beach at low tide, and that she went sidewise (Ap. 73, 74). There is not a scintilla of evidence that there were any rocks on that beach or that the ship lay upon her anchors. To have dragged her anchors up on the beach was impossible. This wild theory assumes that Captain Petersen acted not only fraudulently but with foolhardiness in exposing his own life and the lives of his wife and child and all of the crew by venturing to sea in a damaged ship heavily loaded in the stormy season. It is supported only by conjectural and hearsay evidence and sailors' gossip and the fact that the crew mutinied. There was a mutiny and the shipping commissioner was called upon to act. He necessarily was informed as to the grounds upon which the sailors refused to do their work in the ship; there could be no concealment from him of the fact, if it were a fact, that they refused to stay in an unseaworthy vessel. If so informed, what he did in settling the disturbance was criminal, for he transferred the crew to another vessel and shipped the crew of that other vessel for the voyage on which the "Stanford" was bound (Ap. 67). By bringing the mutiny to bear this fanciful defense overreached itself, for the action of the shipping commissioner refutes the whole theory. The defense was an obvious afterthought. It was not pleaded in the answer.

The damages.

The appellee is entitled to recover full compensation for the injury by the rule of restitutio in integrum.

The Potomac, 105 U. S. 630, 26 L. Ed. 1194.

The stipulations (Ap. 50, 140) and the assignments of error relieve the court from the necessity of any investigation as to details of the injuries to the ship or costs of repairs. Only four items included in the amount of damages awarded by the decree are contested. The first of these is fifty dollars for Captain Petersen's personal expenses while attending to all the business of getting the ship towed in and out of the Columbia River, discharging and reloading the cargo, docking, repairing, auditing expense bills and securing a new crew. That amount of expense was not excessive and was actually and necessarily incurred (Ap. 122, 125-6). The second contested item is for $250, commissions paid for securing a new crew, which was necessary to enable the ship to proceed on her voyage after being repaired. The amount was actually disbursed and the necessity for it proved and explained by the testimony of Captain Petersen (Ap. 122, 123, 126), and found by Judge Cushman to be customary and necessary (Ap. 42). The third item is for $160.80, expenses of the general average adjustment. As different parties own the ship and cargo, an adjustment of losses and contributions was necessary and the amount allowed by the decree for the necessary expense is fair and reasonable. That amount comprises $30 fee of adjustment committee, $100 for the adjuster's fee, and $30.80 for expense of printing the adjuster's re-

port. (Proved by the deposition of the adjuster, Mr. Alexander, Ap. 130, 31, 32). We cite as authorities justifying allowance of these items the following cases:

The Energia, 61 Fed. 222-224; affirmed in 66 Fed. 604, 608;

Erie & W. T. Co. v. City of Chicago, 178 Fed. 42, 51.

The fourth item is for $1820.27, interest on the amount of the money actually expended at six per cent. per annum for a period of five years. The only error in making this allowance is for the appellee, and not for the appellant, to complain of. Nearly seven years intervened between the time of the injury and the date of the decree. The amount of the appellee's actual cash expenditures is $6067.68. The money all passed through the hands of Brown & McCabe, the ship's agents at Portland. They made two drafts on the appellee, one for $5443.15, and the other for $2723.17, which were paid (testimony of Hedges, Ap. 127, 8, 9). Interest is due to the appellee as a legal right on the amount of money actually expended according to the decisions of this court in a line of cases.

Wellesley Co. v. Hooper, 185 Fed. 733, 740;

The Jeanie, 236 Fed. 463, 473.

Seven years intervened between the time of the injury and the date of the decree, but the trial court allowed interest for only five years of that time. The reason given by Judge Cushman for cutting down the interest for only a period of five years is that the case was not brought on for a final hearing at an earlier

date. There was, however, no showing that the appellant was restrained from pressing the case, nor that it was prejudiced by delay. Therefore, we respectfully submit that mere forebearance on the part of the appellee is not ground for forfeiture of a legal right, and, inasmuch as there is no substantial ground for this appeal, it deserves to be treated as frivolous. And we ask the court to affirm the decree with a modification allowing interest for one year and nine months additional time, so that the amount of the decree, exclusive of costs, will be $9,655 instead of $9,018.

Dated, San Francisco,
February 15, 1918.

Respectfuly submitted,

IRA A. CAMPBELL,
C. H. HANFORD,
MCCUTCHEN, OLNEY & WILLARD,
Attorneys for Appellee.

No. 3094

United States

Circuit Court of Appeals

For the Ninth Circuit.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,

Defendants.

Citation on Appeal.

The United States of America,—ss.

To the United States of America, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals, Ninth Circuit, of the United States, to be holden at San Francisco, California, on the 18 day of February, 1917, pursuant to an appeal filed in the clerk's office of the United States District Court in and for the Southern District of California, Northern Division, Ninth Circuit, wherein the Devil's Den Consolidated Oil Company, a corporation, is appellant and the United States of America is respondent to show cause, if any there be, why the order and decree appointing Howard M. Payne receiver of the properties involved in the above-entitled suit should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable MAURICE T. DOOLING, Judge of said District Court, this 19 day of January, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America one hundred and forty-first.

M. T. DOOLING,
District Judge. [4*]

Due service of the within Citation on Appeal is hereby admitted and acknowledged on behalf of the United States this 19th day of January, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
FRANK HALL,
Special Assistants to the Attorney General,
Attorneys for Appellees.

[Endorsed]: In Equity—No. A–37 Eq. In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Citation on Appeal. Filed Jan. 23, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [5]

*Page-number appearing at foot of page of original certified Transcript of Record.

Names and Addresses of Attorneys.

For Appellant:

JOSEPH D. REDDING, Esq., and Messrs. MORRISON, DUNNE & BROBECK, Crocker Building, San Francisco, California.

For Appellees:

ROBERT O'CONNOR, Esq., United States Attorney, Los Angeles, California; HENRY F. MAY, Esq., and FRANK HALL, Esq., Special Assistants to the Attorney General, San Francisco, California. [6]

In the District Court of the United States of America, in and for the Southern District of California, Northern Division.

IN EQUITY—No. A-37.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, and STANDARD OIL COMPANY, a Corporation,
Defendants. [7]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37–Eq.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,

Defendants.

Bill of Complaint.

To the Judges of the District Court of the United States for the Southern District of California, Sitting Within and for the Northern Division of Said District:

The United States of America, by Thomas W. Gregory, its Attorney General, presents this, its Bill in Equity, against Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company (citizens and residents, respectively, as stated in the next succeeding paragraph of this bill), and for cause of its complaint alleges:

I.

Each of the defendants, Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, now is and at all times hereinafter mentioned as to it was, a corporation organized under the laws of the State of California.

II.

For a long time prior to and on the 27th day of September, 1909, and at all times since said date, the plaintiff has been and now is the owner and entitled to the possession of the following described petroleum, or mineral oil, and gas lands, [8] to wit:

The Northeast Quarter of Section Thirty in Township Twenty-six South, of Range Twenty-one East, Mount Diablo Base and Meridian,

and of the oil, petroleum, gas, and all other minerals contained in said land.

III.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other lands) from mineral exploration, and from all forms of location or settlement, selection, filing, entry, patent, occupation, or disposal, under the mineral and nonmineral land laws of the United States; and since said last named date none of said lands have been subject to exploration for mineral oil, petroleum or gas, occupation, or the institution of any right to such oil or gas under the public land laws of the United States.

IV.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and lawful orders and proclamations of the President of the United States, and particularly in violation of the

said order of withdrawal of the 27th of September, 1909, the defendant herein, to wit, Devil's Den Consolidated Oil Company, entered upon the said land hereinbefore particularly described, long subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas. [9]

V.

Said defendant Devil's Den Consolidated Oil Company had not discovered petroleum, gas or other minerals on said land on or before the 27th day of September, 1909, and had acquired no rights on, or with respect to said land on or prior to said date.

VI.

Long after the said order of withdrawal of September 27, 1909, to wit: Some time in the latter part of the year 1910, as plaintiff is informed and believes, the defendant Devil's Den Consolidated Oil Company discovered petroleum on said land, and has produced, and caused to be produced therefrom large quantities of petroleum, but the exact amount so produced plaintiff is unable to state. Of the petroleum so produced large quantities thereof have been sold and delivered by the defendant Devil's Den Consolidated Oil Company to defendants Associated Oil Company and Standard Oil Company, but the exact amount, or amounts, so sold plaintiff is unable to state.

Plaintiff does not know and is therefore unable to state the amount of petroleum which defendant Devil's Den Consolidated Oil Company may have sold to other corporations or persons, nor the amount extracted and now remaining undisposed of; nor the

price received for such as has been sold defendants Associated Oil Company and Standard Oil Company, or other corporations or persons, and has no means of ascertaining the facts in the premises except from said defendants Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, and therefore a full discovery from said defendants is sought herein.

VII.

The defendant Devil's Den Consolidated Oil Company is now extracting oil from said land, boring oil and gas wells, [10] and otherwise trespassing upon said land and asserting claims thereto, and if it continues to procure oil therefrom it will be taken and wrongfully sold and converted, and various other trespasses and waste will be committed upon said land, to the irreparable injury of complainant, and to the interference with the policies of the complainant with respect to the conservation, use and disposition of said land, and particularly the petroleum, oil and gas contained therein.

VIII.

Each of the defendants claims some right, title or interest in said land or some part thereof, or in the oil, petroleum or gas extracted therefrom, or in or to the proceeds arising from the sale thereof, or through and by purchase thereof, and each of said claims is predicated upon or derived directly or mediately from some pretended notice or notices of mining locations, and by conveyances, contracts or liens directly or mediately from said such pretended locators. But none of such location notices and claims are valid

against complainant, and no rights have accrued to the defendants or either of them thereunder, either directly or mediately; nor have any minerals been discovered or produced on said land except as hereinbefore stated; but said claims so asserted cast a cloud upon the title of the complainant and wrongfully interfere with its operation and disposition of said land, to the great and irreparable injury of complainant; and the complainant is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions.

IX.

Neither of the defendants, nor any person or corporation from whom they have derived any alleged interest was, at the date of said order of withdrawal of September 27, 1909, nor was any other person at such date a *bona fide* occupant or claimant [11] of said land and in the diligent prosecution of work leading to the discovery of oil or gas.

X.

The defendant Devil's Den Consolidated Oil Company claims said land under a location notice posted and filed in the names of Chas. Togni, U. D. Switzer (*alias* Paul Switzer), E. C. Farnsworth, A. R. Orr, M. T. Mills, C. J. Giddings, L. C. Hyde, and W. B. Wallace, and as the Consolidated Placer Mining Claim. And said location notice under which the said defendant claims is dated February 13, 1907.

XI.

The said location notice was filed and posted by or for the sole benefit of the defendant, the Devil's Den Consolidated Oil Company, and the names of the pre-

tended locators above set out were employed and used by said defendant company to enable it to acquire more than twenty acres of mineral land in violation of the laws of the United States. The said persons whose names were used in said location notice were not *bona fide* locators, and each of them was without an interest in said location notice so filed, and their names were not used to enable them or either of them to secure said land or patent therefor; but each of said persons was a mere dummy used by said defendant company for its benefit, all of which complainant is informed and believes, and so alleges.

XII.

That soon after the date of said location notice so posted and filed, to wit, on May 30, 1907, the defendant Devil's Den Consolidated Oil Company carried out its original plan to unlawfully acquire more than twenty acres of mineral land under one location made by it or for its benefit, by causing said persons whose names were so used as dummies to convey to it by deed the said northeast quarter of said land described in Article II [12] hereof, and said defendant company fraudulently claims said land under said location notice, and under said deed dated May 30, 1907.

XIII.

Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein or any of them, and therefore leaves said defendants to set forth their respective claims of interest.

In that behalf, the plaintiff alleges that, because of

the premises of this bill, none of the defendants have, or ever had any right, title or interest in or to, or lien upon said land or any part thereof, or any right, title or interest in or to the petroleum, mineral oil, or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convert or dispose of the petroleum and gas so extracted, or any part thereof; on the contrary, the acts of those defendants who have entered upon said land and drilled oil wells and used and appropriated the petroleum and gas deposited therein, and assumed to sell and convey any interest in or to any part of said land, were all in violation of the laws of the United States and the aforesaid order withdrawing and reserving said land, and all of said acts were and are in violation of the rights of the plaintiff, and such acts interfere with the execution by complainant of its public policies with respect to said land.

XIV.

The present value of said land hereinbefore described exceeds Five Hundred Thousand Dollars ($500,000).

In consideration of the premises thus exhibited, and inasmuch as plaintiff is without full and adequate remedy in the premises, save in a court of equity where matters of this nature are properly cognizable and relievable, plaintiff prays: [13]

1. That said defendants, and each of them, may be required to make full, true and direct answer respectively to all and singular the matters and things hereinbefore stated and charged, and to fully disclose and state their claims to said land hereinbefore

described, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived;

2. That the said land may be declared by this Court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws of the United States; and that the said location notice of February 13, 1907, was fraudulently filed, and the said defendant did not acquire any right thereunder;

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants, and each and every one of them;

4. That each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land or any part thereof, or in or to any [14] of the minerals, or mineral deposits therein, or there-

under contained; and that each and all of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises, and from in any manner extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof;

5. That an accounting may be had by said defendants, and each and every one of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted, or received by them or either of them, from said land, or any part thereof, and of any and all moneys or other property or thing of value received from the sale or disposition of any and all minerals extracted from said land or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract or agreement concerning said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages sustained by the plaintiff in these premises;

6. That a receiver may be appointed by this Court to take possession of said land and of all

wells, derricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or any of them, which have been used or now are being used in the extraction, [15] storage, transportation, refining, sale, manufacture, or in any other manner in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals where such course is necessary to protect the property of the complainant against injury and waste, and for the preservation, protection and use of the oil and gas in said land, and the wells, derricks, pumps, tanks, storage vats, pipes, pipe-lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents or assigns in the production, transportation, manufacture or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers of courts of chancery.

To the end, therefore, that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed to said defendants herein, to wit: Devil's Den Consolidated Oil Company, Associated Oil Com-

pany, and Standard Oil Company, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there, severally, full, true and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by, such order, direction and decree as may be made against them, or any of them, in the premises, and shall be meet and agreeable to equity.

THOS. W. GREGORY,
Attorney General of the United States.
ALBERT SCHOONOVER,
United States District Attorney. **[16]**
E. J. JUSTICE,
Special Assistant to the Attorney General.
A. E. CAMPBELL,
Special Assistant to the Attorney General.

United States of America,
Southern District of California.

J. D. Yelverton, being first duly sworn, deposes and says:

He is now and has been since the 1st day of March, 1913, Chief of Field Service of the General Land Office of the United States, and since the 1st day of July, 1915, has also been in direct charge of the San Francisco office of the Field Division of the General Land Office, and much of his official work has been done in the investigation of facts relating to the lands withdrawn by the President as oil lands,

and especially the lands withdrawn by order of September 27, 1909, and by the order of July 2, 1910. That from examinations of such lands, and the facts in relation thereto by Special Agents acting under his direction as such Chief of Field Service, and from examinations of the records of the General Land Office, and the local Land Office of Complainant in said State of California, and particularly from the detailed reports of the Field Agents, and accompanying affidavits setting forth the facts, he is informed as to the matters and things stated in the foregoing complaint with reference to the particular lands therein described; and the matters therein stated are true, except as to such matters as are stated to be on information and belief, and as to these, affiant, after investigation, states he believes them to be true.

J. D. YELVERTON.

Subscribed and sworn to before me this 10th day of September, 1915.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California. **[17]**

[Endorsed]: No. A-37-Eq. In the District Court of the United States for the Southern District of California. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Bill of Complaint. Filed Sep. 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. **[18]**

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,

Defendants.

Answer by Devil's Den Consolidated Oil Company.

Comes now Devil's Den Consolidated Oil Company, one of the defendants in the above-entitled action, and in answer to the complaint of the plaintiff therein admits and denies as follows:

I.

Admits that the plaintiff holds the legal title to the property referred to and described in paragraph II of said complaint, but denies that said plaintiff is entitled to the possession of the said lands, or to any part thereof, or to the possession of the oil, petroleum, gas and all other minerals, or to the possession of any mineral contained in said lands, and in this behalf the said defendant alleges that it is and ever since the 30th day of May, 1907, has been entitled to the possession of the said lands described in said paragraph II, and to the possession of the oil, petroleum, gas and all other minerals [19] con-

tained therein, and is the equitable owner of said lands and is entitled to the execution by the plaintiff of a patent to it, conveying to it the legal title to said lands and to all the minerals contained therein.

II.

Admits that on the 27th day of September, 1909, the President of the United States legally withdrew and reserved certain land from mineral exploration and from all forms of location or settlement, selection, filing, entry, patent, occupation, or disposal under the mineral and non-mineral land laws of the United States, but denies that by said order the lands described in paragraph II of said complaint, which said lands, as heretofore alleged, are in the lawful possession of this defendant, were in any manner affected, or that the rights of this plaintiff were in any manner affected thereby; that in and by the terms of said order of withdrawal it was provided that all locations or claims existing and valid on the date of said withdrawal might proceed to entry in the usual manner after filing, investigation and examination, and that the land described in paragraph II of said complaint, at all times since the 13th day of February, 1907, has been and now is a valid location and claim within the meaning, purport and effect of the said proviso to the said withdrawal order.

III.

Denies that in violation of the proprietary and other rights of the plaintiff, and in violation of the laws of the United States, and lawful orders and proclamations of the President of the United States,

and in violation of said order of withdrawal of the 27th of September, 1909, or that in violation of any right of the plaintiff or of any law of the United States or of any proclamation of the President of the United States, the **[20]** said defendant entered upon the said lands described in said complaint, or upon any part thereof long, or at all, subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas, or for any purpose, and in this behalf the said defendant alleges that it, and its assignors and predecessors in interest, have been in the lawful possession of the said land since the 13th day of February, 1907.

IV.

Admits that this defendant had not discovered petroleum or gas on said land on or before the 27th day of September, 1909, but denies that the said defendant had not discovered other mineral on said land on or before said date and denies that it had acquired no rights on or with respect to said land on or prior to said date and in this behalf the said defendant alleges that, its assignors and predecessors in interest, through whom this defendant deraigns its title, discovered a mineral, to wit, gypsum, on said land long before the 27th day of September, 1909, to wit, on the 13th day of February, 1907, and that by virtue of said discovery and the due posting and recording of a valid location notice and by virtue of the performance of the annual labor and assessment work required by statute, and the due performance by it, and by its prede-

cessors in interest of all the requirements of the laws relating thereto, this defendant acquired rights on and with respect to said lands, which said rights could not lawfully be, and were not, impaired by said withdrawal order of the 27th day of September, 1909.

V.

Admits that after the said order of withdrawal of September 27, 1909, this defendant discovered petroleum on said land, and has produced and caused to be produced therefrom large **[21]** quantities of petroleum; that the plaintiff herein has been heretofore apprised of the amount of petroleum so produced by this defendant and the persons to whom said petroleum was sold and the prices received therefor.

VI.

Admits that this defendant is now extracting oil from said lands, but denies that it is now boring oil wells or gas wells thereon, or that it is at all trespassing upon said land; admits that if this defendant continues to procure oil from the said lands that the said oil so produced will be sold by this defendant, but denies that such sales, or any such sale, will be wrongful or will amount to the conversion of the said oil, and denies that various other trespasses and waste, or any trespass or waste, will be committed upon said lands by this defendant, to the irreparable injury, or to the injury at all of the plaintiff, with respect to the conservation, use and disposition of said lands, or with respect to the conservation, use and disposition of the petroleum,

oil or gas contained therein, or to the injury of the plaintiff in any manner or for any reason.

VII.

Admits that the right, title and interest claimed by this defendant in and to said land and in and to the oil, petroleum and gas extracted therefrom, and in and to the proceeds arising from the sale thereof, is predicated upon and derived from a notice of mining location and by conveyance from the original locators thereof, but denies that said notice was, or is a pretended notice, or that said conveyance was made by a pretended location or locators; denies that such location notice and claim is not valid against the complainant, and denies that no rights have accrued to this defendant thereunder; denies that the claim **[22]** of this defendant in and to the said lands casts a cloud upon the title of the complainant, or that said claim of this defendant wrongfully interferes with the operation and disposition of said land by said complainant to the great and irreparable injury of the complainant, or to the injury at all of the complainant, and in this behalf this defendant alleges, as hereinbefore stated, that its rights in and to said lands are based upon and derived from a valid and legal location of said lands, and upon a valid and legal conveyance of said mining claim covering said lands, from said original locators to this defendant.

VIII.

Denies that this defendant was not at the date of said order of withdrawal of September 27, 1909, a *bona fide* occupant or claimant of said lands; and in

this behalf the defendant alleges that on said date it was a *bona fide* occupant, and claimant, and the equitable owner of said lands, as the assignee and grantee of said original mining claim covering said lands, and as the assignee and grantee of the persons who discovered mineral thereon on the 13th day of February, 1907, and who located the same in compliance with the provisions of the Revised Statutes of the United States covering the location of mining claims.

IX.

Admits that this defendant claims said lands under a location notice posted and filed in the names of Chas. Togni, U. D. Switzer (also known as Paul Switzer), E. C. Farnsworth, A. R. Orr, M. T. Mills, C. J. Giddings, L. C. Hyde, and W. B. Wallace, under the name of the Consolidated Placer Mining Claim, and that said location notice under which said defendant claims is dated February 13, 1907. **[23]**

X.

Denies that said location notice was filed and posted or was filed or posted by or for the sole benefit, or the benefit at all, of this defendant, Devil's Den Consolidated Oil Company; and denies that the names of said locators were, or that the name of any of them was, employed and used, or was or were employed or used, by said defendant to enable it to acquire more than twenty acres of mineral land, or to acquire any amount of mineral land in violation of the laws of the United States. Denies that said persons whose names appear in said location notice were not *bona fide* locators and denies that

each or any of said persons was without an interest in said location notice so filed, and denies that their names were not used to enable them, or any of them, to secure said land themselves, or to secure patent therefor for themselves; denies that each or that any of said persons named was a dummy used by said defendant company for its benefit; and in this behalf this defendant alleges that said location notice was filed and posted by the persons whose names are set forth by the plaintiff in its complaint, through an agent acting for and representing them, in good faith and for the purpose of acquiring the said land and the minerals contained therein for themselves, and not for the benefit of this defendant or any other person or persons.

XI.

Denies that on May 30, 1907, or that at any time the defendant Devil's Den Consolidated Oil Company carried out its alleged original plan to unlawfully acquire more than twenty acres of mineral land under one location made by it, or for its benefit, by causing said persons, whose names the plaintiff alleges were used as dummies, to convey to it by deed the said land **[24]** described in said complaint; and in this behalf the said defendant alleges that on May 30, 1907, the said original locators acting in good faith, and in their own interest, and in the interest of each of them, conveyed the said lands to this defendant; that the said persons so conveying the said lands were on said date stockholders in this defendant corporation, and that as this defendant is informed and believes and therefore alleges the

fact to be, they so executed the said conveyance in order to increase the value of their stock in this defendant corporation and to enable the said persons to perform the necessary assessment work thereon more conveniently, satisfactorily and economically to themselves.

XII.

Denies that because of the matters alleged in plaintiff's complaint, or for any reason, this defendant has no right, title or interest in or to or lien upon said lands, or any part thereof, or any right, title or interest in or to the petroleum, mineral oil or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convert or dispose of the petroleum and gas so extracted, or any part thereof; denies that the acts of this defendant in entering upon said lands and drilling oil wells thereon, and using and appropriating the petroleum and gas deposited therein, were in violation of the laws of the United States or of the aforesaid order withdrawing and reserving said lands, or that any act or acts at any time done by this defendant with respect to said lands was or were in violation of any law of the United States, or of any order withdrawing or attempting or purporting to withdraw the said lands; denies that any act done by this defendant was and is, or was or is, in violation of any right of the plaintiff, or that any act of this defendant [25] interferes with the execution by the complainant of its public policies with respect to said lands, or to any part of said lands.

XIII.

Defendant denies that plaintiff is without redress or adequate remedy save by this suit, or that this suit is necessary to avoid multiplicity of actions.

By way of a further, separate and affirmative answer and defense to plaintiff's complaint, this defendant alleges that its grantors and predecessors in interest made a valid discovery of mineral upon the said northeast quarter of section thirty (30) township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., and duly located the same as a mining claim, on the 13th day of February, 1907, while said lands were unoccupied public lands of the United States, open to exploration and location for minerals, under the provisions of the revised statutes of the United States, and before any withdrawal thereof; and that this defendant and its grantors, and predecessors in interest have held and worked the said lands described in said complaint, namely: The said northeast quarter of section thirty (30), township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., as a mining claim, for a period equal to the time prescribed by the statute of limitations for mining claims, of the State of California, in which state the said lands are located, to wit, for a period of five (5) years, prior to the commencement of this action without any adverse claim being made in or to said lands, or to any part thereof; and that this defendant by reason of said facts is now [26] the true, equitable owner of said land and entitled to a patent thereto from the Government of the

United States under the provisions of Section 2332 of the Revised Statutes of the United States.

For a further, separate and distinct answer and defense herein this defendant alleges that plaintiff has a plain, speedy and adequate remedy at law by an action in ejectment or by an action for conversion, and that this suit should have been brought as an action on the law side of this Honorable Court, and that it should be transferred to the law side and there be proceeded with.

WHEREFORE, this defendant prays that this suit be forthwith transferred to the law side of this Honorable Court, and that the same be there proceeded with, with only such alterations in the pleadings as shall be essential, and that complainant take nothing by this action as against this defendant, and that the action be dismissed and this defendant recover its costs and disbursements herein expended.

D. E. PERKINS,
JOSEPH REDDING,
MORRISON, DUNNE & BROBECK,
A. F. MORRISON,
Solicitors for said Defendant. [27]

Receipt of a copy of the within Answer by Devil's Den Consolidated Oil Co. is hereby admitted this 13th day of October, 1915.

E. J. JUSTICE,
K.,
Solicitor for Plaintiff.

[Endorsed]: In Equity—No. A-37. United States District Court, Northern Division, Ninth Circuit, Southern District of California. United States of

America, Plaintiff, vs. Devil's Den Consolidated Oil Company et al., Defendants. Answer by Devil's Den Consolidated Oil Company. Filed Oct. 14, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy. Joseph D. Redding, D. E. Perkins, Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for said Defendant. [28]

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,

Defendants.

Amended Answer of Devil's Den Consolidated Oil Company.

Comes now defendant Devil's Den Consolidated Oil Company, one of the defendants in the above-entitled action, and by leave of court first had and obtained, files this its amended answer to the complaint of plaintiff therein, and in answer to the said complaint of said plaintiff, admits and denies as follows:

I.

Admits that the plaintiff holds the legal title to

the property referred to and described in paragraph II of said complaint, but denies that said plaintiff is entitled to the possession of the said lands, or to any part thereof, or to the possession of the oil, petroleum, gas and all other minerals, or to the possession of any mineral contained in said lands, and in this behalf the said defendant alleges that it is and ever since the 30th day of May, 1907, has been entitled to the possession of the said lands described in said paragraph II, and to the possession of the oil, petroleum, gas and all other minerals [29] contained therein, and is the equitable owner of said lands and is entitled to the execution by the plaintiff of a patent to it, conveying to it the legal title to said lands and to all the minerals contained therein.

II.

Admits that on the 27th day of September, 1909, the President of the United States legally withdrew and reserved certain land from mineral exploration and from all the forms of location or settlement, selection, filing, entry, patent, occupation, or disposal under the mineral and nonmineral land laws of the United States, but denies that by said order the lands described in paragraph II of said complaint, which said lands, as heretofore alleged, are in the lawful possession of this defendant, were in any manner affected, or that the rights of this plaintiff were in any manner affected thereby; that in and by the terms of said order or withdrawal it was provided that all locations or claims existing and valid on the date of said withdrawal might proceed to entry in the usual manner after filing,

investigation and examination, and that the land described in paragraph II of said complaint, at all times since the 13th day of February, 1907, has been and now is a valid location and claim within the meaning, purport and effect of the said proviso to the said withdrawal order.

III.

Denies that in violation of the proprietary and other rights of the plaintiff, and in violation of the laws of the United States, and lawful orders and proclamations of the President of the United States, and in violation of said order of withdrawal of the 27th of September, 1909, or that in violation of any right of the plaintiff or of any law of the United States or of any proclamation of the President of the United States, the [30] said defendant entered upon the said lands described in said complaint, or upon any part thereof long, or at all, subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas, or for any purpose, and in this behalf the said defendant alleges that it, and its assignors and predecessors in interest, have been in the lawful possession of the said land since the 13th day of February, 1907.

IV.

Admits that this defendant had not discovered petroleum or gas on said land on or before the 27th day of September, 1909, but denies that the said defendant had not discovered other mineral on said land on or before said date and denies that it had acquired no rights on or with respect to said land

on or prior to said date and in this behalf the said defendant alleges that, its assignors and predecessors in interest, through whom this defendant deraigns its title, discovered a mineral, to wit, gypsum, on said land long before the 27th day of September, 1909, to wit, on the 13th day of February, 1907, and that by virtue of said discovery and the due posting and recording of a valid location notice and by virtue of the performance of the annual labor and assessment work required by statute, and the due performance by it, and by its predecessors in interest of all the requirements of the laws relating thereto, this defendant acquired rights on and with respect to said lands, which said rights could not lawfully be, and were not, impaired by said withdrawal order of the 27th day of September, 1909.

V.

Admits that after the said order of withdrawal of September 27, 1909, this defendant discovered petroleum on said land, and has produced and caused to be produced therefrom large [31] quantities of petroleum; that the plaintiff herein has been heretofore apprised of the amount of petroleum so produced by this defendant and the persons to whom said petroleum was sold and the prices received therefor.

VI.

Admits that this defendant is now extracting oil from said land, but denies that it is now boring oil wells or gas wells thereon, or that it is at all trespassing upon said land; admits that if this defendant continues to procure oil from the said lands that

the said oil so produced will be sold by this defendant, but denies that such sales, or any such sale, will be wrongful or will amount to the conversion of the said oil, and denies that various other trespasses and waste, or any trespass or waste, will be committed upon said lands by this defendant, to the irreparable injury, or to the injury at all of the plaintiff with respect to the conservation, use and disposition of said lands, or with respect to the conservation, use and disposition of the petroleum, oil or gas contained therein, or to the injury of the plaintiff in any manner or for any reason.

VII.

Admits that the right, title and interest claimed by this defendant in and to said land and in and to the oil, petroleum and gas extracted therefrom, and in and to the proceeds arising from the sale thereof, is predicated upon and derived from a notice of mining location and by conveyance from the original locators thereof, but denies that said notice was, or is a pretended notice, or that said conveyance was made by a pretended locator or locators; denies that such location notice and claim is not valid against the complainant, and denies that no rights have accrued to this defendant thereunder; denies that the claim [32] of this defendant in and to the said lands casts a cloud upon the title of the complainant, or that said claim of this defendant wrongfully interferes with the operation and disposition of said land by said complainant to the great and irreparable injury of the complainant, or to the injury at all of the complainant, and in this behalf

this defendant alleges, as hereinbefore stated, that its rights in and to said lands are based upon and derived from a valid and legal location of said lands, and upon a valid and legal conveyance of said mining claim covering said lands, from said original locators to this defendant.

VIII.

Denies that this defendant was not at the date of said order of withdrawal of September 27, 1909, a *bona fide* occupant or claimant of said lands; and in this behalf the defendant alleges that on said date it was a *bona fide* occupant, and claimant, and the equitable owner of said lands, as the assignee and grantee of said original mining claim covering said lands, and as the assignee and grantee of the persons who discovered mineral thereon on the 13th day of February, 1907, and who located the same in compliance with the provisions of the Revised Statutes of the United States covering the location of mining claims.

IX.

Admits that this defendant claims said lands under a location notice posted and filed in the names of Chas. Togni, U. D. Switzer (also known as Paul Switzer), E. C. Farnsworth, A. R. Orr, M. T. Mills, C. J. Giddings, L. C. Hyde, and W. B. Wallace, under the name of the Consolidated Placer Mining Claim, and that said location notice under which said defendant claims is dated February 13, 1907. [33]

X.

Denies that said location notice was filed and posted or was filed or posted by or for the sole bene-

fit, or the benefit at all, of this defendant, Devil's Den Consolidated Oil Company; and denies that the names of said locators were, or that the name of any of them was, employed and used, or was or were employed or used, by said defendant to enable it to acquire more than twenty acres of mineral land, or to acquire any amount of mineral land in violation of the laws of the United States. Denies that said persons whose names appear in said location notice were not *bona fide* locators and denies that each or any of said persons named was a dummy used by said location notice so filed, and denies that their names were not used to enable them, or any of them, to secure said land themselves, or to secure patent therefor for themselves; denies that each or that any of said prsons named was a dummy used by said defendant company for its benefit; and in this behalf this defendant alleges that said location notice was filed and posted by the persons whose names are set forth by the plaintiff in its complaint, through an agent acting for and representing them, in good faith and for the purpose of acquiring the said land and the minerals contained therein for themselves, and not for the benefit of this defendant or any other person or persons.

XI.

Denies that on May 30, 1907, or that at any time the defendant Devil's Den Consolidated Oil Company carried out its alleged original plan to unlawfully acquire more than twenty acres of mineral land under one location made by it, or for its benefit, by causing said persons, whose names the plaintiff al-

leges were used as dummies, to convey to it by deed the said land [34] described in said complaint; and in this behalf the said defendant alleges that on May 30, 1907, the said original locators acting in good faith, and in their own interest, and in the interest of each of them, conveyed the said lands to this defendant; that the said persons so conveying the said lands were on said date stockholders in this defendant corporation, and that as this defendant is informed and believes, and therefore alleges the fact to be, they so executed the said conveyance in order to increase the value of their stock in this defendant corporation and to enable the said persons to perform the necessary assessment work thereon more conveniently, satisfactorily and economically to themselves.

XII.

Denies that because of the matters alleged in plaintiff's complaint, or for any reason, this defendant has no right, title or interest in or to or lien upon said lands, or any part thereof, or any right, title or interest in or to the petroleum, mineral oil or gas deposited therein, or any right to extract the petroleum or mineral oil or gas from said land, or to convert or dispose of the petroleum and gas so extracted, or any part thereof; denies that the acts of this defendant in entering upon said lands and drilling oil wells thereon, and using and appropriating the petroleum and gas deposited therein, were in violation of the laws of the United States or of the aforesaid order withdrawing and reserving said lands, or that any act or acts at any time done by

this defendant with respect to said lands was or were in violation of any law of the United States, or of [35] any order withdrawing or attempting or purporting to withdraw the said lands; denies that any act done by this defendant was and is, or was or is, in violation of any right of the plaintiff, or that any act of this defendant interferes with the execution by the complainant of its public policies with respect to said lands, or to any part of said lands.

XIII.

Defendant denies that plaintiff is without redress or adequate remedy save by this suit, or that this suit is necessary to avoid multiplicity of actions.

By way of a further, separate and affirmative answer and defense to plaintiff's complaint, this defendant alleges that its grantors and predecessors in interest made a valid discovery of mineral upon the said northeast quarter of section thirty (30), township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., and duly located the same as a mining claim, on the 13th day of February, 1907, while said lands were unoccupied public lands of the United States, open to exploration and location for minerals, under the provisions of the Revised Statutes of the United States, and before any withdrawal thereof; and that this defendant and its grantors, and predecessors in interest have held and worked the said lands [36] described in said complaint, namely: The said Northeast quarter of section thirty (30), township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., as a mining claim, for a period equal to the time pre-

scribed by the statute of limitations for mining claims, of the State of California, in which state the said lands are located, to wit, for a period of five (5) years, prior to the commencement of this action without any adverse claim being made in or to said lands, or to any part thereof; and that this defendant by reason of said facts is now the true, equitable owner of said land and entitled to a patent thereto from the government of the United States under the provisions of section 2332 of the Revised Statutes of the United States.

For a further, separate and distinct answer and defense herein, this defendant alleges that plaintiff has a plain, speedy and adequate remedy at law by an action in ejectment or by an action for conversion, and that this suit should have been brought as an action on the law side of this Honorable Court, and that it should be transferred to the law side and there be proceeded with. [37]

For a further separate and affirmative defense to plaintiff's bill of complaint the said defendant alleges that this court has no jurisdiction to try the matter set forth in said bill of complaint, or the title to the land described in said complaint, or the right to possession of said land, or any part thereof, or the right, title, interest or claim in or to the petroleum, mineral oil or gas deposited and being therein, or the right of said defendant to extract petroleum, gas or other minerals from said land, and in this behalf the said defendant alleges:

I.

That the defendant Devil's Den Consolidated Oil

Company now is and at all times herein mentioned was a corporation organized and existing under the laws of the State of California, and authorized and empowered to locate mining claims upon the public lands of the United States under the laws relating thereto.

II.

That the following-described land, to wit, the northeast quarter of section 20, township 26 south, range 21 east, M. D. B. & M., being the land mentioned in plaintiff's complaint, was on the 13th day of February, 1907, and long prior thereto, public land of the United States, open to location and appropriation under the laws of the United States relating to what are usually known as "Placers" or placer mining ground, and as such was chiefly and only valuable for the petroleum and gypsum therein contained, and ever since said 13th day of February, 1907, continuously down to the present date, and at the time of the commencement of this action, the disposition and disposal of said land was, and now is, under the exclusive jurisdiction and control of the General Land Department of the United States, the Commissioner [38] of the General Land Office and the Secretary of the Interior of the United States.

III.

That on the 13th day of February, 1907, Charles Togni, U. D. Sweitzer (also known as Paul Sweitzer), E. C. Farnsworth, L. C. Hyde, W. B. Wallace, M. T. Mills, C. J. Giddings, and A. R. Orr, each and all of whom were then and there citizens of the

United States, entered upon and took possession of said northeast quarter of said section 30, township 26 south, range 21 east, M. D. B. & M., and duly located the same as a placer mining claim under the laws of the United States, which said placer mining claim was to be known as, and was called, the "Consolidated Placer Mining Claim," and did duly post thereon a notice of location, and did duly file for record in the office of the County Recorder of the County of Kern, California, in Book 40 of Mining Records, page 286, said notice of location, which said notice of location was duly recorded on the 23d day of February, 1907.

IV.

That thereafter, and on or about the 30th day of May, 1907, said last-named locators made, executed and delivered their deed wherein and whereby they conveyed said northeast quarter of said section 30, and all of their right, title and interest therein to said defendant Devil's Den Consolidated Oil Company.

V.

That ever since said 13th day of February, 1907, the said land has been in the actual, peaceable, open, notorious, continuous, exclusive and undisputed possession of the said Devil's Den Consolidated Oil Company, and its predecessors in interest, the said locators of said mining claim, and that during each year since the said year 1907, more than one hundred dollars ($100) [39] has been expended upon said land in work and improvements thereon, and in the development thereof; that the said last-named lo-

cators, prior to said location of said land, discovered thereon large valuable and extensive deposits of gypsum of good commercial quality, and that the same have been opened up and developed; that the value of labor and improvements done and made for the purpose of developing the gypsum deposits in said land exceeds the sum of five hundred dollars ($500); that during the year 1910, this defendant caused a well to be drilled on said land for the purpose of exploring for and developing petroleum oil; that when said well was completed, it produced oil of about 300 barrels or more per day of 24 hours; that the value and cost of said well exceeded the sum of three thousand dollars ($3,000).

VI.

That said land contains no known lodes, and is valuable for its placer mineral contents only, and has no value for purposes of agriculture or timber or stone, nor is there any water therein, nor is there any stream of water nor watercourse running through the same; that no adverse claim has ever been made to said northeast quarter of section 30, nor to any part thereof, except the claim of the Government, as hereinafter stated.

VII.

That thereafter, and on or about the 2d day of August, 1911, and long prior to the commencement of the above-entitled action, the said defendant Devil's Den Consolidated Oil Company did duly make and file its application for patent in the proper land office of the United States, to wit, the United States Land Office at Visalia, California, wherein

and whereby it did apply to the United States of America and to the General Land Department [40] thereof, in accordance with the requirements of law, for a patent to said northeast quarter of section 30, township 26 south, range 21 east, M. D. B. & M.; that said application was numbered Mineral Entry No. 03280, and was known as such in said United States Land Office at Visalia, California.

VII.

That said application for said patent was made for and on behalf of said defendant by I. T. Bell, who was duly designated, authorized and empowered by resolution of the directors of said defendant company to make on its behalf all necessary affidavits and other papers pertaining to said application; that said I. T. Bell was at said time, and now is, a person conversant with all of the facts sought to be established by the affidavits presented in support of said application for patent; that said application for patent was in the form of an affidavit, and was accompanied by other affidavits in support thereof; that said affidavit of application for patent set forth the authority of affiant, to wit, said I. T. Bell, to make application for patent to said land, the company's qualification to make such application and to acquire a patent, the location of said placer mining land, with the names of the locators, the transfer of said land by the original locators to said defendant, the possession by said defendant and its predecessors in interest continuously from the said 13th day of February, 1907, down to the date of making said application, the extent of the work done in developing

gypsum and petroleum in said land, the amount of money that had been expended in developing the same, the fact that there were no intervening rights to said land; that the land had no streams or body of water on or adjoining said land, and no growth of timber thereon, and that the land [41] was of no value for any other purpose than for grazing and for producing gypsum and petroleum, and finally asked for a patent to said land; that the affidavits accompanying said application for patent duly set forth all the matters required by law, in order to entitle the said applicant to a patent to the said land; that in particular there was filed with said application for patent:

(1) Supplemental and corroborative affidavit made by John E. Henry and Russell Mills relative to the character of the said land, and the mineral contained therein and the improvements made thereon;

(2) A certified copy of the notice of location of said mining claim embracing said northeast quarter of said section 30;

(3) A certified copy of the articles of incorporation of said Devil's Den Consolidated Oil Company;

(4) A certified copy of the resolution appointing the said I. T. Bell to make all papers necessary in connection with said application for patent;

(5) The affidavit of I. T. Bell that he duly posted notice of the intention of said applicant to apply for a patent to said land;

(6) The affidavit of W. E. Jones and R. O. Buckley that they witnessed the posting of the said notice of intention to apply for a patent to said land;

(7) A copy of the notice of application for patent to said land, signed by this defendant.

(8) An affidavit of John E. Henry and Russell Mills, setting forth the absence of veins or lodes within said land;

(9) A copy of the agreement entered into with the publisher of the "Delano Record," a weekly newspaper, by which [42] agreement the said publisher agreed to publish the said notice of intention to apply for patent on the terms set forth therein and required by law;

That said application for patent set forth all the matters and things required by law, and was accompanied by all of the documents required by law, in due form and duly executed; that with said application for patent was duly filed an abstract of title, made by a duly authorized abstract company, which company was competent to make abstracts of title to lands in Kern County, which said abstract of title showed and established that the record title of said land and mining claim, according to said records, was vested in this defendant company at the time of making the said application for patent.

VIII.

That upon the filing of said application for patent, the Register of the United States Land Office at Visalia, California, gave due notice on or about the 3d day of August, 1911, that said Devil's Den Consolidated Oil Company had made application for patent to said northeast quarter of section 30, township 26 south, range 21 east, M. D. B. & M., as required by law, which said notice was published in the "De-

lano Record," a weekly newspaper published in the town of Delano, county of Kern, California, in each issue of said paper for ten (10) consecutive weeks, the first publication being on the 3d day of August, 1911, and the last publication being on the 5th day of October, 1911, all of which facts appear, and due proof thereof was made in the affidavit of C. H. Seiders, filed in said application for patent to said land, which said affidavit was duly and regularly subscribed and sworn to; that said "Delano Record" in which said notice was published, is a newspaper of established character and general circulation and was designated by said Register as the newspaper in which said [43] *said* notice was to be published, and as the newspaper nearest said land; that thereafter in said proceedings for application for patent there was filed an affidavit of I. T. Bell of continuous posting of said notice given by said Devil's Den Consolidated Oil Company of its intention to apply for patent for said land, setting forth that said notice of intention was conspicuously posted upon said land on the 30th day of July, 1911, and that said notice remained continuously and conspicuously posted upon said land from the said 20th day of July, 1911, to and including the 5th day of October, 1911; that there was also filed another affidavit duly executed by said I. T. Bell, wherein he made a sworn statement of the sums of money paid by said applicant in the prosecution of said application for patent to said northeast quarter of section 30, township 26 south, range 21 east, M. D. B. & M.

X.

That thereafter said Devil's Den Consolidated Oil Company did duly make its application in writing to the Register and Receiver of the United States Land Office at Visalia, California, to purchase said mining claim embracing said northeast quarter of section 30, township 26 south, range 21 east, M. D. B. & M., containing one hundred and sixty (160) acres, and therein did agree to pay therefor the sum of four hundred dollars ($400), the same being the legal price therefor; that thereafter and on the 31st day of October, 1911, the said defendant Devil's Den Consolidated Oil Company paid to the plaintiff herein to and through the Receiver of public moneys at the United States Land Office at Visalia, California, the said sum of four hundred dollars ($400), in full payment for the said land, and did receive therefor the receipt of said receiver of the public moneys in the United States Land Office at Visalia, California; and the said receiver did duly issue to said Devil's [44] Den Consolidated Oil Company the regular and legal receipt in duplicate for the sum paid by this defendant, and thereupon the Register and Receiver of said Land Office did forward one of said duplicate receipts with the entire record in said application for patent proceedings to the Honorable Commissioner of the General Land Office of the United States for his inspection and approval, and said proceedings ever since have been, and now are pending before said Honorable Commissioner of said General Land Office; that on the 10th day of November, 1911, the Chief of the Field Division of the Land Department

of the United States reported a protest on said land by stamping "protest" on said application.

XI.

That thereafter, and on or about the 2d day of September, 1915, this defendant was notified that a special agent of the United States Land Office had filed certain charges against the validity of its said Mineral Application Entry No. 03280, a copy of which said charges is hereto annexed, marked Exhibit "A," and made a part hereof; that thereafter, and on the 22d day of September, 1915, this defendant by John Daniel, its vice-president, duly filed its answer to said charges in the United States Land Office, a copy of which said answer is hereunto annexed, marked Exhibit "B," and made a part hereof; that as hereinbefore alleged, the application of this defendant for patent to said land is still pending and undisposed of; that the Commissioner of the General Land Office, as head of said General Land Department of the United States, has not made nor rendered any decision upon said application for patent, nor has the Secretary of the Interior, or any other officer, qualified so to do, made or rendered any decision thereon; that under the circumstances herein alleged, all of the matters [45] set up in plaintiff's bill of complaint herein, are under the exclusive control and jurisdiction of the Secretary of the Interior of the United States and the Commissioner of the General Land Office of the United States; that this court has no jurisdiction or authority to interfere with the exercise of said exclusive control and jurisdiction of said Secretary of the In-

terior and of said Commissioner of the General Land Office, or to proceed with the hearing of this action while said application for patent proceedings is pending.

This defendant further alleges that the value of the land referred to and described in plaintiff's bill of complaint and the value of the oil, petroleum, and gas contained therein are, and the value of each of them is, in excess of one thousand dollars ($1,000), and further alleges that the matter in controversy in the above-entitled suit exceeds one thousand dollars ($1,000), besides costs.

WHEREFORE, this defendant prays that plaintiff take nothing by this action as against this defendant, and that it be dismissed with its costs and disbursements herein expended.

JOS. D. REDDING,
MORRISON, DUNNE & BROBECK,
Attorneys for Devil's Den Consolidated Oil Company. [46]

State of California,
City and County of San Francisco,—ss.

Geo. T. Cameron, being first duly sworn, deposes and says:

That he is an officer, to wit, the president of Devil's Den Consolidated Oil Company, a corporation, one of the defendants in the foregoing Amended Answer; that he has read said Amended Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and

as to those matters that he believes it to be true.

GEO. T. CAMERON.

Subscribed and sworn to before me, this 25th day of June, 1916.

[Seal] R. B. TREAT,

Notary Public in and for the City and County of San Francisco, State of California. [47]

Exhibit "A" to Amended Answer of Devil's Den Con. Oil Co.

4—018a.

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

Visalia, California,
Place

September 2, 1915.
Date.

R. A. Morton,
Crocker Bldg.,
S. F., Calif.

Sir:

By authority of General Land Office letter "FS" dated August 27, 1915, you are hereby notified that a special agent of that office has filed the following charges against the validity of your Mineral Application entry, No. 03280, made August 2, 1911, for NE. ¼, Sec. 30, T 26 S., R 21 E., M. D. M., to wit:

1. "That no discovery of oil or gas has been made upon the NE. ¼ Sec. 30, T. 26 S., R 21 E. M. D. M. at date of withdrawal of September 27, 1909, nor at the date of withdrawal of July 2,

1910, nor was the applicant company, or its predecessors in interest, in diligent prosecution of work leading to a discovery of oil or gas in the above-described land at the date of the aforesaid withdrawals.

2. "That the said mineral application was not made with the *bona fide* purpose of developing a gypsum placer claim, but said gypsum placer application was made for the purpose of obtaining title to valuable oil lands by a subterfuge.

3. "That the location of the consolidated placer mining claim for the NE. ¼ Sec. 30, T. 26 S., R. 21, E. M. D. M. by Charles Togni, Paul Sweitzer (sometimes known as U. D. Sweitzer) E. C. Farnsworth, A. R. Orr, M. T. Mills, C. J. Giddings, L. C. Hyde, and W. B. Wallace, as a purported association, was in fact made by the Devil's Den Consolidated Oil Company, a corporation, for its sole use and benefit, through the use and employment, with their full knowledge and consent, of the names of the alleged locators, with the purpose and intent, by such device, fraud and concealment to secure thereby unlawfully, in fraud of the law, and in direct violation of section 2331 of the United States Revised Statutes, a greater area of mineral land than may be lawfully embraced in a single location by a corporation. [48]

4. "That Charles Togni, Paul Sweitzer (sometimes known as U. D. Sweitzer), E. C. Farnsworth,

A. R. Orr, M. T. Mills, C. J. Giddings, L. S. Hyde and W. B. Wallace, did not in good faith locate, and file location of notice for the above-described placer claim with the intent that the legal title to the land embraced in said claim should be acquired pursuant to the laws of the United States governing the location, entry, or disposition, of public lands and valuable as placer grounds, for their separate and several use and benefit, but each of the above-named persons made location and filed location notices pursuant to an unlawful agreement and understanding, either expressed or implied, entered into by each and every one of the above-named persons, whereby the said location was made and location notice filed in the interest and for the use and benefit, in whole or in part of the Devil's Den Consolidated Oil Company, a corporation, to secure by the aforesaid agreement and device, unlawfully and in violation of Section 2331 United States Revised Statutes, to the said Devil's Den Consolidated Oil Company, a corporation, the control and apparent possessory right to an amount of mineral land in excess of the area that may be lawfully embraced in a single location by a corporation." [49]

Exhibit "B" to Amended Answer of Devil's Den Con. Oil Co.

Filed Sept. 22, 1915.

In The United States Land Office,
Visalia, California.

COPY.

In the Matter of the Application of THE DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation, for a Patent to Consolidated Placer Mining Claim Embracing NE. ¼, Sec. 30, T. 26 S., R. 21 E. M. D. M.

ANSWER TO CHARGES.

State of California,
City and County of San Francisco,—ss.

John Daniel, being first duly sworn, deposes and says: That he is a citizen of the United States and a resident of the State of California, and over the age of twenty-one years; that he is the vice-president of the Devil's Den Consolidated Oil Company, a corporation, the applicant for patent above described and makes, verifies and files this answer to charges contained in the letter "FS" of the Commissioner of the General Land Office, dated August 27, 1915; that answering said charges said applicant:

1. Admits that no discovery of oil or gas was made upon the northeast quarter of section 30, Township 26 south, range 21 east, M. D. M., at the date of the withdrawal of September 27, 1909, nor at the date of the withdrawal of July 2, 1910, but denies that said applicant or its predecessors in interest, *was*

not in the diligent prosecution of work leading to a discovery of oil or gas in the above-described land at the date of the aforesaid withdrawals, but, on the contrary, alleges that on and prior to September 27, 1909, and on and prior to July 2, 1910, said applicant was in the diligent prosecution of work leading to the discovery of oil or gas on the above-described land and continued in the diligent prosecution of said work until oil and gas *was* discovered [50] thereon during the year 1910.

2. Denies that said mineral application was not made with the *bona fide* purpose of developing a gypsum placer claim; denies said gypsum placer application was made for the purpose of obtaining title to valuable oil lands by a subterfuge. As a further answer to said second charg*ed* applicant demurs thereto and contends that said second charg*ed* *does* not state facts sufficient to warrant adverse proceedings against said application or to justify the cancellation of applicant's application.

3. Denies that the location of the Consolidated Placer Mining Claim for northeast quarter, section 30, township 26, south, range 21 east, M. D. M. by Charles Togni, Paul Sweitzer, (sometimes known as U. D. Sweitzer), E. C. Farnsworth, A. R. Orr, M. T. Mills, C. J. Giddings, L. C. Hyde and W. B. Wallace, or by any of them, as a purported association, was in fact made by the Devil's Den Consolidated Oil Company, a corporation, for its sole use and benefit, through the use or employment, with their full knowledge or consent of the names of the alleged locators, or of the names of any of them, with

the purpose or intent, by such, or any, device, fraud or concealment to secure thereby unlawfully, in fraud of the law, or in direct, or any violation of Section 2331 of the United States Revised Statutes, or of any other law, a greater area of mineral land than may be lawfully embraced in a single location by a corporation.

4. Denies that Charles Togni, Paul Sweitzer (sometimes known as U. D. Sweitzer), E. C. Farnsworth, A. R. Orr, M. T. Mills, C. J. Giddings, L. S. Hyde, (or L. C. Hyde), or W. B. Wallace, did not in good faith locate or file location notice for the above-described placer claim with the intent that the legal title to the land embraced in said claim should be acquired pursuant to the laws of the United States governing the location, entry or disposition of public lands and valuable as placer ground, for their separate [51] and several use or benefit, but on the contrary allege that said named locators did in good faith locate, and file location notice for the above-described placer claim with the intent that the legal title to the land embraced in said claim should be acquired pursuant to the laws of the United States governing the location; entry or disposition of public lands and valuable as placer ground for their separate and several use and benefit; and denies that each of the above-named persons made location or filed location notice pursuant to an unlawful agreement, or any agreement, or understanding, either expressed or implied, entered into by each and everyone, or any of the above-named persons, whereby the said location was made or location notice filed in the

interest or for the use or benefit, in whole or in part of the Devil's Den Consolidated Oil Company, a corporation to secure by the aforesaid or by any, agreement or device, unlawfully or in violation to Section 2331 of the United States Revised Statutes, or any of other law, to the said Devil's Den Consolidated Oil Comyany, a corporation, the control, or apparent possessory right to an amount of mineral land in excess of the area that may be lawfully embraced in a single location by a corporation.

Wherefore, applicant asks that a hearing be ordered upon said charges and this answer thereto and that thereupon said charges be dismissed and patent issued to applicant as prayed for in its said application.

Said application hereby appoints Joseph D. Redding, Crocker Building, San Francisco, California, and D. E. Perkins, National Bank of Visalia Building, Visalia, California, as its attorneys herein and requests that all papers relating to said matters be served on its said attorneys.

JOHN DANIEL.

Subscribed and sworn to before me this 20th day of September, 1915.

[Seal] W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, California. [52]

[Endorsements]:

Receipt of a copy of the within Amended Answer is hereby admitted this 14th day of August, 1916, at 3:55 P. M.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Attorneys for Plaintiff.

No. A–37. In Equity. United States District Court, Southern District of California. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company et al., Defendants. Amended Answer of Devil's Den Consolidated Oil Co. Filed Aug. 16, 1916 Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for said Defendant. [53]

In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit.

No. A–37—IN EQUITY.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,
Defendants.

Answer of Associated Oil Company.

For answer to the Bill of Complaint in the above suit, the defendant Associated Oil Company in said suit says:

I.

Admits the allegations of paragraph I of said Bill of Complaint.

II.

Admits that for a long time prior to and on the 27th day of September, 1909, and at all times since said date the plaintiff has held and now holds the legal title to the land described in paragraph II of said Bill of Complaint, but alleges that the defendant Devil's Den Consolidated Oil Company claims and ever since the 30th day of May, 1907, has claimed that it is the equitable owner of said land.

This defendant states that it is without knowledge as to whether or not plaintiff has at any time since said 30th day of May, 1907, been entitled to the possession of said land, and of the oil, petroleum, gas and all other minerals contained in said land, or as to whether or not plaintiff has at any time since said [54] 30th day of May, 1907, been entitled to the possession of said land, or any part thereof, or of the oil, petroleum, gas or any other mineral contained in said land, or any part thereof, but alleges that said defendant Devil's Den Consolidated Oil Company claims that it is and ever since the 30th day of May, 1907, has been entitled to the possession of said land and of the oil, petroleum, gas and all other minerals contained therein.

III.

Admits that on the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior and under the authority legally invested in him so to do, duly and regularly issued a proclamation in the words and figures following, to wit:

"TEMPORARY PETROLEUM WITHDRAWAL NO. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain all public lands in accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after filing, investigation and examination."

Admits that the land described in paragraph II of said Bill of Complaint was mentioned in the lists accompanying said temporary petroleum withdrawal No. 5 and further admits that since said 27th day of September, 1909, none of the public lands mentioned in said lists on which there were no locations or claims existing and valid on said last-named date have been subject to exploration for mineral oil, petroleum or gas, occupation or the institution of any right under the public land [55] laws of the United States, but alleges that said defendant Devil's Den Consolidated Oil Company claims that the land described in paragraph II of said Bill of Complaint has at all times since the 13th day of

February, 1907, been, and that it now is a valid location and claim within the meaning, purport, intent and effect of the provision in said temporary petroleum withdrawal No. 5, that all locations and claims existing and valid on the 27th day of September, 1909, may proceed to entry in the usual manner after filing, investigation and examination.

IV.

Denies upon information and belief that in violation of the proprietary or other rights of the plaintiff or in violation of the laws of the United States or any lawful order or proclamation of the President of the United States, or particularly in violation of the said order of withdrawal of September 27th, 1909, the said defendant Devil's Den Consolidated Oil Company entered upon the land in paragraph II of said Bill of Complaint described long subsequent or at any time subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas, or either or for any other purpose.

V.

This defendant states that it is without knowledge as to whether or not said defendant Devil's Den Consolidated Oil Company had not discovered petroleum, gas or other minerals on said land on or before the 27th day of September, 1909, or as to whether or not said defendant had acquired any rights on or with respect to said land on or prior to said date, but alleges that said defendant Devil's Den Consolidated Oil Company claims to have acquired rights on or with respect to said land prior to

said 27th day of September, [56] 1909, and that its rights were not and could not lawfully be affected or impaired by said temporary petroleum withdrawal No. 5.

VI.

This defendant states that it is without knowledge as to when said defendant discovered petroleum on said land, or as to the quantity of petroleum said defendant has produced or caused to be produced therefrom.

Denies that of the petroleum produced from the land described in paragraph II of said Bill of Complaint large quantities thereof, or any quantity, has been sold and delivered, or sold or delivered, by the defendant Devil's Den Consolidated Oil Company to this defendant, and in this behalf alleges that on the 16th day of January, 1912, and ever since said date the Universal Oil Company, a corporation organized and existing under the laws of the State of California, has been in possession of and has been operating the land described in paragraph II of the Bill of Complaint herein and contiguous lands, and that on or about the 16th day of January, 1912, said Universal Oil Company entered into an agreement with this defendant for the sale and delivery by said Universal Oil Company to this defendant of a certain quantity of crude petroleum to be produced from the land described in paragraph II of the Bill of Complaint herein and from other lands, and that said Universal Oil Company has delivered to this defendant under said agreement a large quantity of crude petroleum, but that this defendant is without

knowledge as to what quantity of crude petroleum, if any, produced from the land described in paragraph II of the Bill of Complaint herein has been delivered to this defendant by said Universal Oil Company.

VII.

This defendant states that it is without knowledge as to any [57] of the matters alleged in paragraph VII of said Bill of Complaint, except as to the allegation that the defendant Devil's Den Consolidated Oil Company is now asserting claims to the land described in paragraph II of said Bill of Complaint.

VIII.

Denies that this defendant claims any right, title, or interest in said land, or any part thereof, or in the oil, petroleum or gas extracted therefrom, or in or to the proceeds, or any part of the proceeds arising from the sale thereof, or through or by any purchase thereof, except as hereinbefore alleged.

This defendant is informed and believes and upon such information and belief states that the claims of the defendant Devil's Den Consolidated Oil Company are predicated upon and derived from a notice of mining location and by conveyance from the original locators of the land described in paragraph II of said Bill of Complaint, but this defendant states that it is without knowledge as to whether or not said notice of location is a pretended notice, or as to whether or not the claims of said defendant Devil's Den Consolidated Oil Company are valid against complainant.

This defendant denies that complainant is without redress or adequate remedy save by this suit, or that this suit is necessary to avoid a multiplicity of actions.

IX.

This defendant states that it is without knowledge as to the matters alleged in paragraph IX of said Bill of Complaint, but alleges that the defendant Devil's Den Consolidated Oil Company claims that it was at the date of said order of withdrawal of September 27th, 1909, a *bona fide* occupant and claimant of said land, and in the diligent prosecution of work leading to the [58] discovery of oil or gas.

X.

This defendant is informed and believes and upon such information and belief admits that the defendant Devil's Den Consolidated Oil Company claims said land under the location notice dated February 13th, 1907, mentioned and referred to in paragraph X of said Bill of Complaint.

XI.

This defendant states that it is without knowledge as to the matters alleged in paragraph XI of said Bill of Complaint.

XII.

This defendant states that it is without knowledge as to the matters alleged in paragraph XII of said Bill of Complaint.

XIII.

This defendant states that it is without knowledge as to the matters alleged in paragraph XIII of said Bill of Complaint, except as otherwise in this answer alleged.

XIV.

This defendant states that it is without knowledge as to the present value of the land described in paragraph II of said Bill of Complaint.

For a further, separate and distinct answer and defense herein this defendant alleges that heretofore, to wit, on the 16th day of January, 1912, Universal Oil Company, a corporation organized under the laws of the State of California, entered into an agreement with this defendant in and by which said Universal Oil Company agreed to sell and deliver to this defendant a specified quantity of crude petroleum to be produced from the land described in paragraph II of the Bill of Complaint herein and from contiguous lands, and this defendant in and by said agreement agreed to pay said Universal [59] Oil Company certain specified prices for the oil sold and delivered to this defendant under said agreement; that at the time said agreement was entered into said Universal Oil Company represented to this defendant that it, said Universal Oil Company, then was and for more than three years prior to said time had been in the possession and entitled to the possession of the lands described in said agreement, which said lands included the land described in paragraph II of the Bill of Complaint herein, and that said Universal Oil Company then was and for a number of years prior thereto had been entitled to extract, remove, sell and dispose of the petroleum contained in said lands, and which might then and thereafter be produced therefrom, and that it had good title thereto; that this defendant believed said representations and relied

thereupon, and but for said reliance thereupon would not have entered into said agreement with said Universal Oil Company; that this defendant did not at the time said agreement was entered into or at any other time prior to the commencement of this suit have any knowledge or notice that plaintiff claims that the land described in paragraph II in the Bill of Complaint herein had not been located in good faith by *bona fide* locators, or that the locators named in paragraph X of said Bill of Complaint, or their successors in interest, were not *bona fide* occupants and claimants of said land and in the diligent prosecution of work leading to the discovery of oil or gas on the 27th day of September, 1909, or that said locators were mere dummies used by the defendant Devil's Den Consolidated Oil Company for its benefit, or that any act of said locators of said defendant was in violation of any law of the United States, or of any right of the plaintiff, and that this defendant has not and at no time had any knowledge or notice other than that contained in plaintiff's Bill of Complaint herein that any of said claims of [60] plaintiff is or are true, and that relying upon said representations of said Universal Oil Company and upon the said agreement without notice or knowledge of any of the claims of the plaintiff hereinabove mentioned or referred to, this defendant has under and pursuant to the said agreement for a valuable consideration by this defendant fully paid to said Universal Oil Company prior to the commencement of this suit in good faith purchased and received from said company a large quantity of petroleum produced from the lands

described in said agreement, but what portion thereof, if any, was produced from the land described in paragraph II of said Bill of Complaint, this defendant is unable to state, and this defendant further alleges that said defendant Devil's Den Consolidated Oil Company by itself and those claiming under it has been openly, peaceably, uninterruptedly, continuously and exclusively in the possession and operation of the land described in paragraph II of the Bill of Complaint herein without any adverse claim being made to said land, or any part thereof, by the plaintiff or anyone else for a period of time longer than that prescribed by the statute of limitations of the State of California for the commencement of actions for the *recover* of the possession of real property, to wit, for a period of more than five years prior to the commencement of this suit, and that by the long and unreasonable delay in the assertion of the claims set forth by the plaintiff in its Bill of Complaint herein and by the long and unreasonable delay of the plaintiff herein to sue it was and has been and is guilty of laches, and the alleged cause of action set forth by the plaintiff in its Bill of Complaint herein is barred thereby, and the plaintiff is estopped from maintaining and it would be inequitable to permit plaintiff to maintain this suit against this defendant, or to recover, [61] or to permit plaintiff to recover anything from this defendant.

For a further, separate and distinct answer and defense herein this defendant alleges that there is a nonjoinder of parties defendant herein, in this—that Universal Oil Company is not made a party defend-

ant herein, and in this behalf this defendant alleges that Universal Oil Company is and for a number of years last past has been in possession of and operating the land described in paragraph II of the Bill of Complaint herein and disposing of the petroleum produced by it from said land under the defendant Devil's Den Consolidated Oil Company.

For a further, separate an distinct answer and defense herein this defendant alleges that there is a misjoinder of parties defendant herein, in this—that this defendant is improperly joined with the defendants Devil's Den Consolidated Oil Company and Standard Oil Company.

For a further, separate and distinct answer and defense herein this defendant alleges that plaintiff has a plain, speedy and adequate remedy at law by an action in ejectment, or by an action for conversion, and that this suit should have been brought as an action on the law side of this Honorable Court, and that it should be transferred to the law side and be there proceeded with.

WHEREFORE, this defendant prays that this suit be forthwith transferred to the law side of this Honorable Court and that same be there proceeded with, with only such alteration in the pleadings as shall be essential, and that complainant take nothing by this action as against this defendant, and that this defendant recover its costs herein.

HENRY ACH,
T.,
EDMUND TAUSZKY,
Solicitors for Defendant Associated Oil Company. [62]

Service of within answer is hereby admitted this 13th day of October, 1915.
of October, 1915.

E. J. JUSTICE,
Special Assistant to the Attorney General.
K.

[Endorsed]: No. A–37—In Equity. District Court of the United States, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Answer of Associated Oil Company. Filed Oct. 14, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Edmund Tauszky, Henry Ach, Solicitors for Deft. Associated Oil Co., San Francisco, Calif. **[63]**

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants.

Notice of Motion to Have the Jurisdictional Defense of the Defendants Separately Heard and Disposed of.

To United States of America, Plaintiff Above-named, to E. J. Justice and Frank Hall, Its Solicitors:

You will please take notice that the defendant, Devil's Den Consolidated Oil Company, a corporation will move before the Honorable, the United States District Court, for the Southern District of California, at the courtroom of said Court, in the Federal Building, at San Francisco, California, on the 15th day of August, 1916, at 10:00 o'clock A. M., or as soon thereafter as counsel may be heard in the above-entitled cause, for an order to the effect that the jurisdictional defense of the said defendant in the above-entitled action may be separately heard and disposed of on the 1st day of September, 1916, in said court, when said court is convened, or as soon thereafter as counsel may be heard, or at such time as the Court may fix; and that said jurisdictional defense may be separately heard and disposed of before the trial of the principal case in this action, and before the hearing and trial upon any other motions or proceedings in this case. Said motion will be based on [64] Rule 29 and the other pertinent rules of the Rules of Practice for the Court of Equity of the United States, as promulgated and defined by the Honorable, the Supreme Court of the United States of America, and upon the complaint and Answer of said defend-

ant on file herein, and particularly upon the further and separate Answer of said defendant raising the question of the jurisdiction of this Honorable Court to hear the said suit on file herein; said motion will be further made and presented upon the ground that the equitable, expeditious, proper and orderly disposal of this action requires that this Honorable Court shall first determine whether or not it has any jurisdiction over the subject matter involved in this suit, or of this defendant.

You will please further take notice that said hearing and disposal of said jurisdictional defense of the said defendant will be based upon all of the pleadings in the above-entitled action and upon proofs of the allegations set up in the Answer of the said defendant, to be introduced by the said defendant at said hearing, and upon affidavits and oral testimony and upon the records in the United States Land Office, and their various departments in San Francisco, California, and Washington, D. C., all of which, or so much thereof as may be necessary, are to be presented and introduced at said hearing.

JOS. D. REDDING,
MORRISON, DUNNE & BROBECK,
Attorneys for said Defendant, Devils Den Consolidated Oil Company. [65]

Receipt of a copy of the within Notice of Motion is hereby admitted this 14th day of August, 1916, at 3:55 P. M.

E. J. JUSTICE
A. E. CAMPBELL,
FRANK HALL,
Attorneys for Plaintiff.

[Endorsed]: No. A–37—In Equity. United States District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devils Den Consolidated Oil Company et al., Defendants. Notice of Motion to have the Jurisdictional Defense of the Defendants Separately Heard and Disposed of. Filed San Francisco, Aug. 15, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Attorneys for said Defendant. [66]

In the District Court of the United States for the Southern Division of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVILS'S DEN CONSOLIDATED OIL COMPANY, and STANDARD OIL COMPANY,

Defendants.

Notice of Motion for Restraining Order and Receiver.

To Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company:

You, and each of you, will take notice that the plaintiff, the United States of America, will move, before the United States District Court for the

Southern District of California, and the Judge thereof, Honorable B. F. Bledsoe, United States District Judge, at the courtroom of the said Court in the Federal Building, at Los Angeles, California, on Monday, the 19th day of June, 1916, at 10 o'clock A. M., in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants, and attorneys, from taking or moving from the said premises described in the Bill of Complaint herein, any of the mineral oil or petroleum deposited therein, or any of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of [67] the said cause or the further order of this Court.

And you, and each of you, will further take notice that the plaintiff, the United States of America, will then and there move the said Court, and the Judge thereof, in the above-entitled cause for the granting of an order appointing a receiver for the property described in the Bill of Complaint herein, and operated by you, and each of you, and for the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified Bill of Complaint on file herein, affidavits, records, documents, and oral testimony.

Dated this the 10th day of June, 1916.

E. J. JUSTICE,
FRANK HALL,
A. E. CAMPBELL,
Solicitors for the Plaintiff, United States of America. [68]

(RETURN ON SERVICE OF WRIT.)

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the within notice of motion for restraining order and receiver, on O. Sutro, Edmund Tauszky, and Jos. D. Redding, each by handing to and leaving a true and correct copy thereof with, O. Sutro, Edmund Tauszky, and Jos. D. Redding, each personally at the City and County of San Francisco, California, in said district on the 12th day of June, A. D. 1916.

J. B. HOLOHAN,
United States Marshal.
By I. W. Grover,
Office Deputy.

[Endorsed]: Marshal's Docket No. 7434. In Equity—No. A–37. In the District Court of the United States for the Ninth Circuit, Northern Div. of California. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Notice of Motion for Restraining Order and Receiver. Filed Jun. 26, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. E. J. Justice, Frank Hall, A. E. Cambell,

Solicitors for the Plaintiff, United States of America. [69]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Friday, the twenty-eighth day of July, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—July 28, 1916—Order Continuing Hearing of Motion for Restraining Order, etc.

This cause coming on this day to be set down for hearing on the motion of complainant for a restraining order and also on the application of complainant for the appointment of a receiver; E. J. Justice, Esq., A. E. Campbell, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Joseph D. Redding, Esq., appearing as counsel for defendant Devil's Den Consolidated Oil Company; I. Ben-

jamin, one of the official shorthand reporters of this court, being present and acting as such; good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued until Tuesday, the 15th day of August, 1916, at 10 o'clock A. M., for the setting of the same down for said hearing, to be called for the same at San Francisco, California, before Honorable Robert S. Bean, District Judge. [70]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants.

Notice of Motion for Leave to File Amended Answer.

To the United States of America, Plaintiff in the Above-entitled Action, and to E. J. Justice and Frank Hall, Its Attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Tuesday, the 15th day of August, 1916, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard at the Federal Building in the City and County of San Fran-

cisco, California, Devil's Den Consolidated Oil Company, one of the defendants in the above-entitled action, will move the Court for leave to file its amended answer, copy of which is herewith served upon you.

Dated San Francisco, August 14, 1916.

JOS. D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Said Defendant. [71]

Receipt of a copy of the within Notice of Motion is hereby admitted this 14th day of August, 1916, at 3:55 P. M.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Attorneys for Plaintiff.

[Endorsed]: No. A-37—In Equity. United States District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devils Den Consolidated Oil Company et al., Defendants. Notice of Motion of Defendant Devil's Den Consolidated Oil Co. to File Amended Answer. Filed San Francisco, Aug. 15, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Joseph D. Redding, Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Attorneys for Said Defendant. [72]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants.

Notice of Motion for Continuance of Hearing of Motion for Appointment of Receiver, etc.

To the United States of America, Plaintiff, in the Above-entitled Action, and to E. J. Justice and Frank Hall, Its Attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Tuesday, the 15th day of August, 1916, at the hour of ten o'clock, A. M., or as soon thereafter as counsel can be heard at the Federal Building in the City and County of San Francisco, California, Devil's Den Consolidated Oil Company, one of the defendants in the above-entitled suit, will move the Court to continue the hearing of the motion for the appointment of a receiver and for a temporary injunction and on the jurisdictional defense interposed and set up by the said defendant, until Monday, the 28th day of August, 1916, at the hour of ten o'clock A. M., or to such other time as

may by the Court be deemed proper under the circumstances.

Said motion will be based and heard upon the files herein and upon the affidavit of R. L. McWilliams, one of the solicitors for said defendant, a copy of which is hereto attached and made a part hereof.

JOS. D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Said Defendant. [73]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants.

Affidavit of R. L. McWilliams in Support of Motion for Order Continuing Appointment of Receiver, etc.

State of California,
City and County of San Francisco,—ss.

R. W. McWilliams, being first duly sworn, deposes and says:

That he is one of the solicitors for Devil's Den Con-

solidated Oil Company, one of the defendants in the above-entitled action.

That on July 28, 1916, the above-entitled Court set down the motion for the appointment of a receiver and the motion for a temporary injunction for hearing on August 15, 1916; that as affiant is informed and believes, and therefore alleges the fact to be, on said day and at the time the said matters were set down for hearing, as aforesaid, Mr. Joseph D. Redding, one of the solicitors for the said defendant, informed the Court that he had theretofore served notice that the said defendant desired to take the depositions of several witnesses in Washington, including the deposition of the Commissioner of the General Land Office and the [74] Secretary of the Interior of the United States with particular reference to the jurisdiction of this court to hear the above-entitled suit, or to determine any of the issues therein pending proceedings in the Land Department of the United States, and that it might be that he would not complete the taking of the said depositions in time to enable him to be in San Francisco on the said 15th day of August, 1916.

That thereafter and on or about the 10th day of August, 1916, affiant received from the said Joseph D. Redding, a telegram sent from Washington, D. C., in which the said Joseph D. Redding stated that he had sent a telegram to E. J. Justice, one of the solicitors for the plaintiff herein, stating that he was proceeding with the taking of the depositions above referred to, and that it would undoubtedly take until the middle of the following week before he could finish the taking of said depositions, and that he

would thereby be precluded from reaching San Francisco, before the 20th of August, 1916; that this would necessitate the hearing above referred to being postponed about one week; that the evidence that he was obtaining, and seeking to obtain by said depositions goes to the question of the jurisdiction of the Court, the right of the plaintiff herein to an injunction and to the question of the measure of damages; that upon the receipt of the said telegram affiant communicated with the said E. J. Justice and was informed that he had taken the matter up with Judge Bean who was to preside at the hearing of the said motions;

That the said Joseph D. Redding is one of the solicitors for the said defendant in the above-entitled suit, and that it would not be safe for said defendant to proceed with the hearing of the said matters until the return of the said Joseph D. Redding [75] to San Francisco, and until the arrival of the depositions above referred to.

R. L. McWILLIAMS.

Subscribed and sworn to before me this 14th day of August, 1916.

[Seal] W. W. HEALY,

Notary Public in and for the City and County of San Francisco, State of California. [76]

Receipt of a copy of the within Notice of Motion is hereby admitted this 14th day of August, 1916, at 3:55 P. M.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Attorneys for Plaintiff.

[Endorsed]: No. A–37—In Equity. United States District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company et al., Defendants. Notice of Motion of Defd. Devil's Den Consld. Co. and Affidavit of R. L. McWilliams in Support of Motion for Continuance of Hearing of Plffs. Motion for Temporary Injunction, Appointment of a Receiver and Jurisdictional Question. Filed San Francisco, Aug. 15, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Joseph D. Redding, Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Attorneys for Said Defendant. [77]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Tuesday, the fifteenth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 15, 1916—Hearing on Motion for Restraining Order, etc.

This cause coming on this day to be heard on complainants' motion for a restraining order, and also to be heard on an application for the appointment of a receiver; Frank Hall, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Peter F. Dunne, Esq., appearing as counsel for defendant Devil's Den Consolidated Oil Company; R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., also of counsel for defendant Devil's Den Consolidated Oil Company; Edmund Tauszky, Esq., appearing as counsel for defendant Associated Oil Company; Oscar Sutro, Esq., appearing as counsel for defendant Standard Oil Company; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and it appearing that defendant Devil's Den Consolidated Oil Company has moved the Court for a continuance of this cause for said hearing; and said motion for a continuance having been argued, in support thereof, by R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den [78] Consolidated Oil Company, and by Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, and in opposition thereto by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; it is by the Court ordered that this cause be, and the same hereby is continued for said hearing until

Wednesday, the 16th day of August, 1916, at 10 o'clock A. M. [79]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Wednesday, the sixteenth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 16, 1916—Hearing on Motion for Restraining Order, etc.

This cause coming on this day to be heard on defendants' motion for a continuance of this cause for hearing on complainants' motion for a restraining order and an application for the appointment of a receiver herein; Frank Hall, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D.

Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's Den Consolidated Oil Company; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and said motion for continuance having been argued, in support thereof, by Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing as aforesaid on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, and by Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Co., and in opposition thereto by Frank Hall, Esq., Special Assistant [80] to the U. S. Attorney General, of counsel for the United States, it is by the Court ordered that this cause be, and the same hereby is continued for hearing on said motion for injunction and application for appointment of receiver until Monday, the 21st day of August, 1916, at 10 o'clock, A. M., and it is further ordered, on motion of Frank Hall. Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, and with the consent of defendants' counsel in open court, that the testimony of certain witnesses on behalf of complainants on said motion and application may be taken out of order before the Court on Thursday, the 17th day of August, 1916, at 10 o'clock A. M.

* * * * * * * * *

On motion of counsel for defendants, and with the consent in open court of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, it is ordered defendant Devil's

Den Consolidated Oil Company be, and hereby is granted leave to file herein its amended answer to the bill of complaint. [81]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Thursday, the seventeenth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 17, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be heard on complainants' motion for an injunction *pendente lite,* and also to be heard on an application for appointment of a receiver herein; Frank Hall, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf

of Joseph D. Redding, Esq., of counsel for the defendant Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's Den Consolidated Oil Company; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and this cause having been continued until, and again called at 2 P. M., for hearing; and it having been stipulated that testimony may this day be taken on said hearing; and counsel and shorthand reporter being present as at the morning session of court; and counsel for the respective parties having now stipulated in open court [82] that the testimony taken and evidence admitted may be used and considered, so far as applicable both in this cause and in cause No. A–57—Equity, N. D., The United States of America, Complainants, vs. Lost Hills Mining Company et al., Defendants; and Joseph Jansen having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered certain exhibits, which are admitted in evidence in its behalf, to wit: Plffs. Ex. 1, plat of NE. ¼ of Section 30, Tp. 26, R. 21 E., M. D. M., showing gypsum deposits; Plffs. Ex. 2, copy of report, Curtis & Tompkins, analysis of certain samples of gypsum, dated 2/9/1914; Plffs. Ex. 3, copy of report of H. Coffman, analysis of certain samples of gypsum, dated 4/3/1916; Plffs. Ex. 4, copy of report of Smith Emery & Company, determinative as to samples gypsum, dated 12/8/1914; Plffs. Ex. 5, plat made

by witness Jansen, with legend showing exposure of gypsite on W. ½ of NW. ¼ of NE. ¼ of Section 30, Tp. 26 S., R. 21 E., M. D. M.; Plffs. Ex. 6, photograph showing gypsite in trench located on W. ½ of NW. ¼ of NE. ¼ of Section 30, Tp. 26 S., R. 21 E., M. D. M.; Plffs. Ex. 7, photograph showing "explanation" marks, with legend, etc., in same trench as shown in Plffs. Ex. 6; Plffs. Ex. 8, photograph showing middle trench gypsite on W. ½ of NW. ¼ of NE. ¼ of Section 30, Tp. 26 S., R. 21 E., M. D. M., Plffs. Ex. 9, photograph showing east face of middle trench gypsite on same part of said Section 30, Tp. 26 S., R. 21 E., M. D. M.; Plffs. Ex. 10, photograph showing east face of middle trench, near N. end and near S. end, on said W. ½ of NW. ¼ of NE. ¼ of Section 30, Tp. 26 S., R. 21 E., M. D. M.; Plffs. Ex. 11, photograph, same as Plffs. Ex. 10, same view, with explanation marks and legend; Plffs. Ex. 12, photograph showing gypsite trench, on W. ½ of NW. ¼ of NE. ¼ of Section 30, Tp. 26 S., R. 21 E., M. D. M., without [83] explanation; Plffs. Ex. 13, photograph, same as Plffs. Ex. 12, with marks of explanation and legend; and Plffs. Ex. 14, photograph showing middle trench gypsite, same location as that shown in Plffs. 13, with explanations and legend; it is by the Court ordered that this cause be, and the same hereby is continued for further hearing until Monday, the 21st day of August, 1916, at 10 o'clock A. M. [84]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Monday, the twenty-first day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 21, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also coming on to be heard on an application for the appointment of a receiver; E. J. Justice, Esq., Frank Hall, Esq., and A. E. Campbell, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's

Den Consolidated Oil Company; Edmund Tauszky, Esq., appearing as counsel for defendant Associated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having, on behalf of all defendants, objected to any further proceedings in the hearing of the motion for temporary injunction and application for appointment of a receiver until the determination of a question as to the [85] jurisdiction of this Court, thereupon on motion of said counsel for defendants, and with the consent of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, it is ordered that said jurisdictional question be now heard, and that in the meantime said motion for injunction and application for appointment of a receiver remain *in statu quo;* and Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having offered a copy, containing 37 pages, of proceedings before the U. S. Land Office at Visalia, California, *in re* Mineral Application No. 03280, said exhibit is, over the objection of complainants, admitted in evidence as Defendants' Exhibit "A"; and said jurisdictional question having been argued, in opposition to the jurisdiction of the Court herein, by R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, and by Peter F. Dunne, Esq., of counsel for said defendant Devil's Den Consolidated Oil Company; and, after a recess of court

from the hour of 12 o'clock, M., until the hour of 2 o'clock P. M., of this day, this cause having been again called for hearing on said jurisdictional question; and counsel and shorthand reporter being present as before; and said jurisdictional question having been further argued, in opposition to the jurisdiction of the Court herein, by Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company; and in support of the jurisdiction of the Court by Frank Hall, Esq., and E. J. Justice, Esq., Special Assistants to the U. S. Attorney General, of counsel for the United States; it is, at the hour of 5 o'clock, P. M., ordered that this cause be, and the same hereby is continued for further hearing until Tuesday, the 22d day of August, 1916, at 10 o'clock A. M. [86]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Tuesday, the twenty-second day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 22, 1916—Order of Submission, etc.

This cause coming on this day to be further heard on a jurisdictional question; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's Den Consolidated Oil Company; Edmund Tauszky, Esq., appearing as counsel for defendant Associated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and said jurisdictional question having been further argued, in opposition to the jurisdiction of this cause, by Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, and in support of the jurisdiction of the Court by E. J. Justice, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; [87] it is ordered that this cause be, and the same

hereby is submitted to the Court for its consideration and decision on said jurisdictional question, and the argument thereof; thereupon, on motion of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, and over the objection of Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, it is ordered that, at the hour of 2 o'clock, P. M., of this day, the Court shall proceed with the further hearing of the motion for a temporary injunction and the application for appointment of a receiver; and Court, at the hour of 12:15 o'clock, P. M., having taken a recess until the hour of 2 o'clock, P. M., of this day; and Court, at the hour of 2 o'clock, P. M., having reconvened; and counsel and shorthand reporter being present as before, except that E. J. Justice, Esq., Special Assistant to the U. S. Attorney General, does not now appear as one of complainants' counsel; and counsel for the United States having announced that the Government is ready to proceed with the further hearing of complainants' motion for a temporary injunction and the application for the appointment of a receiver, and Peter F. Dunne, Esq., and R. L. McWilliams, Esq., appearing as aforesaid as counsel for defendant Devil's Den Consolidated Oil Company, having renewed the objection to proceeding with said hearing at this time, and the Court having overruled said objection and ordered that the said hearing proceed, to which ruling of the Court, on motion of said counsel for defendants, and by direction of the Court, exceptions are hereby noted herein on behalf of defendants; it is further ordered that all

testimony and proceedings herein shall apply to and be considered also on the hearing of a similar motion and application in each of the causes Nos. A–52—Equity and A–57—Equity, so far as applicable; and the deposition of Joseph Jansen, taken pursuant to stipulation of counsel, before J. D. [88] Brown, notary public, having been offered by counsel for the Government, it is ordered that said deposition be opened, and filed herein, and also in causes Nos. A–52—Equity and A–57—Equity; and said deposition of Joseph Jansen having been read to the Court by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; and, in connection with said deposition, certain exhibits having been offered and admitted in evidence on behalf of the United States, to wit: Plffs. Ex. "A," plat, sectional, of San Joaquin Valley, showing gypsite deposits, etc.; Plffs. Ex. "B.," Circular No. 111, December, 1913, issued by University of California, on the use of lime, gypsum, etc.; Plffs. Ex. "C," sketch, showing gypsum occurrences, etc.; Plffs. Ex. "D," map or plat, showing various methods of sampling; Plffs. Ex. "E," plat showing "Signal Placer" on SE. ¼ of Sec. 30, Township 26 S., R. 21 E.; Plffs. Ex. "F," plat showing gypsite, etc., at "Cd.," on N. ½ of SE. ¼ of SE. ¼ of Sec. 30, Tp. 26 S., R. 21 E.; Plffs. Ex. "G," plat showing "Lost Hills Placer" on NW. ¼ of Sec. 30, Tp. 26 S., R. 21 E.; Plffs. Ex. "H," plat showing "Petroleum Placer" on NW. ¼ of Sec. 32–26-S. 21–E; Plffs. Ex. "I," plat showing "Eagle Placer" on NE. ¼ of Sec. 32–26–21 E.; Plffs. Ex. "J," plat showing "Judge Placer" on SW. ¼

of Sec. 32–26 S–R. 21 E.; Plffs. "K," copy assayer's certificate, Smith Emery & Co., of Dec. 8, 1914; Plffs. Ex. "L," copy assayer's certificate, H. Coffman, of March 16, 1916; and Plffs. Ex. "M," eleven (11) photographs illustrating certain characteristics of gypsum, character land, etc., with legends attached; and the deposition of Orlando D. Barton, taken before the Register and Receiver of the U. S. Land Office at Visalia, Cal., on February 28, 1916, with certificate attached of said Register and Receiver, having been offered by Frank Hall, Esq., Special Assistant to the U. S. Attorney, of counsel for the United States, it is ordered that said deposition be opened and [89] filed in this cause and causes Nos. A–52—Equity and A–57—Equity; and said deposition of Orlando D. Barton having been read to the Court by said counsel for the Government; and the depositions of George A. Coffey, taken before L. B. Hayhurst, Notary Public, at Fresno, Cal., on April 20, 1916, same having been taken pursuant to stipulations, and having a certificate attached of the Register and Receiver of the U. S. Land Office at Visalia, California, having been offered by said counsel for the Government, it is ordered that same be opened, and filed in this cause and in causes Nos. A–52—Equity and A–57—Equity; and said depositions having been read to the Court by said counsel for the Government; it is, at the hour of 5:05 o'clock P. M., ordered that this cause be, and the same hereby is continued for further hearing until Wednesday, the 23d day of August, 1916, at 10 o'clock A. M. [90]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Wednesday, the twenty-third day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 23, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be further heard on complainants' motion for temporary injunction, and also to be further heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's

Den Consolidated Oil Company; Edmund Tauszky, Esq., appearing as counsel for defendant Associated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, having offered on behalf of complainants copy of depositions of W. L. McLaine and H. E. Covey, taken before T. F. Allen, Notary Public, at Bakersfield, [91] California, April 18, 1916, for use in U. S. General Land Office, with certificate attached of the Register and Receiver of the U. S. Land Office at Visalia, California, which depositions are admitted in evidence herein and read to the Court by said counsel for the United States; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, having offered on behalf of complainants a copy of depositions of L. E. Prestage taken before the U. S. Land Office, at Visalia, California, with certificate attached of Frank Laning, Register of said Land Office, which depositions are admitted in evidence and read to the Court by said counsel for the United States; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, having offered the following affidavits, which are admitted in evidence herein on behalf of the United States, and read to the Court, to wit: Affidavit of Orlando D. Barton, taken before J. S. Clack, Notary Public, on October 19, 1915; affidavit of J. H. Favorite, taken before T. L. Baldwin, Deputy Clerk of the U. S. District Court for the Northern District

of California, on June 9th, 1916; and two affidavits of C. L. McDonald, taken before A. H. Thomas, Notary Public, on August 10th, 1916; and J. G. Dean and D. A. Mulvane having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and, after a recess of court from the hour of 12 o'clock, M., until the hour of 2 o'clock, P. M., of this day, this cause having been again called for further hearing, and counsel and shorthand reporter being present as before; and D. A. Mulvane, a witness on behalf of the United States, having again taken the stand for further examination, and having given his testimony; and P. A. English and Silas F. Gillan having respectively been called and [92] sworn as witnesses on behalf of the United States, and having given their testimony; and, in connection with the testimony of said last-named witness, the Government having offered and exhibit, which is admitted in evidence in its behalf, to wit: Plffs. Ex. "N," copy of proof of labor performed on Sec. 30, Tp. 26 S., R. 21 E., M. D. M., as recorded in the Recorder's office of Kern County California; it is, at the hour of 4 o'clock, P. M., ordered that this cause be, and the same hereby is continued for hearing until Thursday, the 24th day of August, 1916, at 10 o'clock A. M. [93]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Thursday, the twenty-fourth day of August, in the year of our Lord one thousand nine hundred and sixteen: Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-37—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,

Defendants.

Minutes of Court—August 24, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be further heard on complainants' motion for a temporary injunction and also to be further heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's Den Consolidated Oil Company; Edmund

Tauszky, Esq., appearing as counsel for defendant Associated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; it is, on motion of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, ordered that the bill of complaint in this cause shall be considered as part of the evidence, etc., on this hearing; and the Government having offered an exhibit, which is admitted in evidence in its behalf, to wit: Plffs. Ex. "O" Oil **[94]** statement of Devil's Den Consolidated Oil Company, January, 1912, to September, 1915; and the Government having rested on this hearing; and counsel for the respective parties having stipulated that defendant Devil's Den Consolidated Oil Company, be now permitted to introduce evidence in this cause; and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having offered in evidence on this hearing the answer of defendant Devil's Den Consolidated Oil Company to the bill of complaint, to which objection is made on behalf of the Government by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, upon which objection the Court reserves ruling and directs that said answer be read; and said answer having been read to the Court by said counsel for defendant Devil's Den Consolidated Oil Company; R. L. McWilliams, Esq., appearing as aforesaid on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil

Company, having presented certain affidavits, which are admitted in evidence on behalf of said defendant, and read to the Court, to wit: Defts. Exhibit "B," affidavit of W. B. Wallace, of 10/13/1915, before D. E. Perkins, Notary Public; Defts. Exhibit "C," affidavit of L. C. Hyde before D. E. Perkins, Notary Public; Defts. Exhibit "D," affidavit of C. J. Giddings before D. E. Perkins, Notary Public; Defts. Exhibit "E," affidavit of M. F. Mills, before D. E. Perkins, Notary Public; Defts. Exhibit "F," affidavit of U. D. Switzer, before D. E. Perkins, Notary Public; Defts. Exhibit "G," affidavit of E. C. Farnsworth, before D. E. Perkins, Notary Public; Defts. Exhibit "H," affidavit of Chas. Togni of 10/12/15, before D. E. Perkins, Notary Public; Defts. Exhibit "I," affidavit of A. R. Orr of 10/13/15, before D. E. Perkins, Notary Public; Defts. Exhibit "J," affidavit of O. D. Barton, of 10/13/15, before D. E. Perkins, Notary Public; Defts. Exhibit "K," affidavit of W. B. Wallace of **[95]** 6/23/1916, before D. E. Perkins, Notary Public; and Defts. Exhibit "L," affidavit of Hugo Fischl, of 10/25/1915, before G. R. Schmidt, Notary Public; and, after a recess of court from the hour of 12 o'clock M., until the hour of 2 o'clock P. M., of this day, this cause having been again called for further hearing, and counsel and shorthand reporter being present as before; and R. A. Morton, a witness on behalf of complainants, having been called, out of order, pursuant to the stipulation in open court of counsel for the respective parties, and having been duly sworn and given his testimony; and Ray N.

Bishop having been called and sworn as a witness on behalf of defendants, and having given his testimony; and, in connection with the testimony of said witness, defendants having offered certain exhibits, which are admitted in evidence in their behalf, to wit: Defts. Ex. "M," photograph taken by W. H. Ochsuer, showing part of NE. ¼ of Sec. 30, Tp. 26 S., R. 21 E., M. D. M.; Defts. Ex. "N," photograph taken by W. H. Ochsuer, showing another view of said quarter section shown in Defts. Ex. "M"; and Defts. Ex. "O," photograph taken by W. H. Ochsuer, showing another view of same quarter section shown in Defts. Exhibits "M" and "N"; and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having offered certain affidavits, which are admitted in evidence and read to the Court by said counsel, to wit: Affidavit of Wm. H. Ochsuer, taken before G. R. Smith, Notary Public, on 10/25/1915, Defendants' Ex. "P"; Defts. Ex. "Q," affidavit of Wm. B. Gester, of 10/16/1915, taken before R. B. Trask, Notary Public; Defts. Ex. "R," affidavit of M. C. Seagrave, of 10/27/1915, taken before R. B. Trask, Notary Public; Defts. Ex. "S," affidavit of R. O. Wrand, of 10/15/1915, taken before H. H. Harris, Notary Public; Defts. Ex. "T," affidavit of T. S. Montgomery, of 6/19/1916, taken before W. W. Healey, Notary Public; **[96]** Defts. Ex. "U," affidavit of F. M. Eaton, of 10/16/1915, taken before R. B. Trask, Notary Public; Defts. Ex. "V," affidavit of Duncan Anderson, of 10/15/1915, taken before R. B. Trask,

Notary Public; Defts. Ex. "W," affidavit of P. W. Tompkins, of 10/15/1915, taken before R. B. Trask, Notary Public; Defts. Ex. "X," affidavit of Edmund Tauszky, of 7/28/1916, taken before R. B. Trask, Notary Public; and Defts. Exhibits "Y," "Y–1," "Y–2," "Y–3," "Y–4," and "Y–5," each of said exhibits being an affidavit of Rudolph Schwatzlose, with small sample of gypsum attached, dated 10/15/1915, taken before G. R. Schmitt, Notary Public; it is, at the hour of 4:55 o'clock P. M., ordered that this cause be, and the same hereby is continued for further hearing until Friday, the 25th day of August, 1916, at 10 o'clock A. M. **[97]**

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Friday, the twenty-fifth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 25, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also to be further heard on an application for the appointment of a receiver herein; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendant Devil's Den Consolidated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and Wm. H. Ocshuer, a witness on behalf of defendant Devil's Den Consolidated Oil Company, having again taken the stand for further examination, and having given his testimony; and W. B. Wallace having been called and sworn as a witness on behalf of defendant Devil's Den Consolidated Oil Company, and having given his testimony; and, after a recess of court from the hour of 12 o'clock M., until the hour of 2 o'clock P. M. [98] of this day, this cause having been again called for further hearing, and counsel and shorthand reporter being present as before; and W. B. Wallace, a witness on behalf of defendant Devil's Den Consolidated Oil Company, having again taken the stand for further examination, and having given his testimony; and

R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having read to the Court the affidavit of R. A. Morton, with exhibit attached, heretofore on July 22d, 1916, filed herein; and Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having offered pages 261 to 270, inclusive, from "Mineral Rescources of the United States," 1914, which is admitted in evidence as Defts. Ex. "Z," and having also offered a reproduction of Diagram on page 262, volume 2, of said "Mineral Rescources of the United States," 1914, which is admitted in evidence as Defts. Ex. "Z–1"; and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, having offered a certain affidavit, which is admitted in evidence and by said counsel read to the Court, to wit: Defts. Ex. "A–1," Affidavit of Samuel F. B. Morse, taken before R. B. Trask, Notary Public, on 8/25/1916; it is, at the hour of 4:25 o'clock P. M., ordered that this cause be, and the same hereby is continued until Mouday, the 28th day of August, 1916, at 10 o'clock A. M. **[99]**

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Monday, the twenty-eighth day of August,

in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 28, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also to be further heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., R. L. McWilliams, Esq., Joseph D. Redding, Esq., and Peter F. Dunne, Esq., appearing as counsel for defendant Devil's Den Consolidated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and W. O. Todd having been called and sworn as a witness on behalf of defendants, and having given his testimony; and Roy A. Bishop, a witness on behalf of defendants, having been again called for further examination, and having given his testimony; and, in connection with the testimony of said witness, defendants having offered certain exhibits, which

are admitted in evidence in their behalf, to wit: Dfts. Ex. "A–2" (there being no exhibit marked "A–1"), **[100]** blue-print, Universal Oil Company, oil pipe-lines, drawn 3/1/1914 by R. B. M., pipe-line located on Sec. 32–26–21; Defts. Ex. "A–3," blue-print, Universal Oil Company, gas pipe-lines, drawn 3/1/1914 by R. B. M., pipe-lines located on Sec. 32–26–21; Defts. Ex. "A–4," blue-print, Universal Oil Company, water pipe-lines, drawn by R. B. M., on 3/1/1914, pipe-lines located on Sec. 32–26–21; Defts. Ex. "A–5," statement marked "Lost Time Record in Hours, Devil's Den Consolidated Oil Company, 6 Months Ending June 30, 1916"; and Defts. Ex. "A–6," Statement marked "Lost Time Record, Universal Oil Co., Six Months Ending June 30, 1916"; and, after a recess of court from the hour of 12:05 o'clock P. M., until the hour of 2 o'clock P. M., of this day, this cause having been again called for further hearing, and counsel and shorthand reporter being present as before; and Roy A. Bishop, a witness on behalf of defendants, having again taken the stand for further examination, and having given his testimony; thereafter, at the hour of 4:35 o'clock P. M., it is ordered that this cause be, and the same hereby is continued for further hearing until Tuesday, the 29th day of August, 1916, at 10 o'clock A. M. **[101]**

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Tuesday, the twenty-ninth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—August 29, 1916—Hearing on Motion for Injunction Pendente Lite, etc.

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also to be heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., R. L. McWilliams, Esq., and Peter F. Dunne, Esq., appearing as counsel for defendant Devil's Den Consolidated Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and R. L. McWilliams, Esq., having offered

an affidavit, which is admitted in evidence on behalf of defendants and read to the Court by said counsel, to wit: Defts. Ex. "A–2," Affidavit of F. M. Anderson, taken before R. B. Trask, Notary Public, on August 25, 1916; and Thomas H. Means having been called and sworn as a witness on behalf of defendants, and having given his testimony; and defendants having rested on this hearing; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for **[102]** the United States, having moved that on behalf of complainants he be allowed to prepare and file herein the affidavit of C. D. Hamel, to which affidavit will be attached three or four other affidavits, made by certain other persons before said C. D. Hamel, as Special Agent of the U. S. Land Department, which motion is opposed by Peter F. Dunne, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, it is ordered that said motion be, and the same hereby is granted, and that, accordingly, complainants be, and hereby are permitted to prepare, serve and file said affidavits within twenty (20) days; and E. D. Latham and J. W. Kingsburg having respectively been called and sworn as witnesses on behalf of the United States in rebuttal, and having given their testimony; and complainants having rested; and the testimony being closed; and, after a recess of court from the hour of 12 o'clock M., until the hour of 2 o'clock P. M., of this day, this cause having been again called for further hearing, and counsel and shorthand reporter being present as before; and said motion for temporary injunction and application for appointment of receiver having been argued,

in support thereof, by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, and in opposition thereto by Peter F. Dunne, Esq., and Joseph D. Redding, Esq., of counsel for defendant Devil's Den Consolidated Oil Company, and in support thereof in reply by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; it is, on motion and by agreement, ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on said motion of complainants for an injunction *pendente lite,* and upon the pleadings, testimony, exhibits, affidavits filed and to be filed, and the argument of said motion and application, and also upon briefs which may be prepared, served and filed as follows, to wit: One behalf of **[103]** defendants within ten (10) days, and on behalf of complainants within ten (10) days thereafter, the clerk of this court being directed to prepare a list of exhibits filed herein, furnishing to the Court, complainants and defendants one (1) copy each. **[104]**

At a special term, to wit, the special October Term, A. D. 1916, of the District Court of the United States for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of Fresno, California, on Wednesday, the 4th day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A–37—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

Minutes of Court—October 4, 1914—Order Overruling Defendant's Plea and Objection to Jurisdiction of Court, etc.

This cause having heretofore been submitted to the Court for its consideration and decision on a plea to the jurisdiction of the Court and on a motion for the issuance of an injunction *pendente lite* herein and on an application for the appointment of a receiver; the Court, having duly considered the same and being fully advised in the premises, now reads its conclusions herein and regarding the matters under submission herein and in causes Nos. A–52—Equity and A–57—Equity, N. D., which conclusions, are not at this time filed, and, pursuant to the Court's ruling in said conclusions, it is ordered that defendants' plea and objection to the jurisdiction of this court herein be, and the same hereby is overruled, and it is further ordered that the motion of complainants for the issuance of an injunction *pendente lite* be, and the same hereby is denied, and it is further ordered that complainants' application for the appointment of a receiver be, and the same hereby is granted for all properties in controversy included in said applica-

tion for appointment of a receiver except the south half (S.½) of [105] section 32, township 26 south, range 21 east, M. D. B. & M., and order accordingly to be prepared and presented by counsel for signature and entry. [106]

In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants.

Order Appointing Receiver.

This suit coming on to be heard on motion of the complainant for the appointment of a receiver and for an injunction, and having been heard on the 21st, 22d, 23d, 24th, 28th and 29th days of August, 1916,—

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that Howard M. Payne be, and he is hereby appointed a receiver,—and until the further order of this court,—for certain of the properties described in the bill of complaint and herein claimed by the defendant, to wit:

Northeast quarter (NE. ¼) of Section Thirty (30), Township Twenty-six (26) South, Range

Twenty-one (21) East, M. D. B. & M., and situated in Kern County, California,

and of the oil and gas already extracted and still in the possession of the defendant, Devil's Den Consolidated Oil Company.

The said Receiver is directed to receive, and the said defendant, Devil's Den Consolidated Oil Company, is directed to [107] surrender to said receiver all moneys in its hands or under its control, or in the hands of any person or corporation for it, which are the proceeds of the sale of oil or was produced from said lands hereinbefore described and such persons holding such funds are directed to pay the same to said receiver; and the said receiver is directed to collect any notes, accounts, or other evidences of debt due or payable on account of the sale of oil and gas produced from said lands and sold by or for said defendant, the Devil's Den Consolidated Oil Company.

IT IS FURTHER ORDERED that the receiver keep an accurate account of the quantity and quality of oil and gas hereafter produced from said lands herein described and until the further order of this Court, that he dispose of and sell the same at the best price or prices obtainable.

Until the further order of this Court the said defendant, Devil's Den Consolidated Oil Company is hereby permitted to continue the operation and management of the properties hereinbefore described, and no change is to be made in the present status, management, or method of operation of said properties—by the receiver—without the consent of

the said defendant, Devil's Den Consolidated Oil Company, or by order of the Court made after ten days notice to the said defendant, other than such as may be necessary to enable said Receiver to ascertain the present condition of the said properties and to receive and dispose of the output thereof and to keep a record and account thereof.

IT IS FURTHER ORDERED that the said Devil's Den Consolidated Oil Company shall render to the said receiver as soon as practicable after the first of each and every month, a statement of the expenses of the management and operation of said properties for the preceding month, and the said receiver shall out of the proceeds of the sale of the oil and gas from said properties hereinbefore described pay to the said Devil's Den Consolidated Oil [108] Company, forthwith the amount of said expenses of operating and managing said properties as set forth in said statement.

The receiver shall, within ten days after the settlement with the said Devil's Den Consolidated Oil Company for expenditures made for the preceding month, make and file with the clerk of this Court a report setting forth the quality and quantity of the oil disposed of and the price received therefor, and a statement of the expenses for the operation and management of the properties for the preceding month, and at such time, such recommendations as he may deem advisable to the Court respecting the management and operation of said property, provided that no recommendation made to the Court in

reference to the properties shall be acted upon by the Court without ten days' notice to both parties and an opportunity to be heard thereon; a copy of said report and recommendations shall be delivered to the solicitors of the parties herein.

IT IS FURTHER ORDERED AND PROVIDED that the said receiver shall, at all reasonable times, have ingress to and egress from said properties for the purpose of examining the same, and with such assistance as may be reasonable so to do. The said receiver shall also have full access, at all reasonable times, to the books of accounts, and records and logs of wells of the said Devil's Den Consolidated Oil Company with reference to said properties.

In the event the complainant herein desires to make an examination of the said property and wells in addition to the examination herein provided to be made by such receiver, it shall be permitted to make such examination at its own expense.

IT IS FURTHER ORDERED THAT a bond in the sum of Twenty-five Thousand Dollars ($25,000) to be approved by this Court, shall be given by the receiver within fifteen days from the filing of this order; provided the solicitors for the complainant or for the defendant, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of said bond. [109]

The moneys coming into the hands of said receiver shall be deposited in the Bank of California, The National Association, in the city of San Francisco, State of California, and shall draw interest at the

rate of at least three per cent per annum and shall be deposited in the name of said receiver and shall remain in said bank subject to the further order of this Court, both as to the amounts of money so deposited and the accumulation of interest thereon, provided that if said bank declines or refuses such rate of interest, then said moneys may be deposited in some other bank to be agreed upon by the parties or to be designated by the Court; provided that the said receiver, from the moneys received by him each month from the sale and disposition of oil and gas from said properties may deposit in a bank and in a non-interest-bearing account so much of said funds as may be necessary to pay the monthly operating and management expenses and the monthly current expenses of the receiver in the execution of this order, provided that said receiver shall not have on hand at any one time moneys in excess of Six Thousand Dollars ($6,000) which are not deposited in The Bank of California, The National Association, in said interest-bearing account as aforesaid.

The amount of compensation to be paid to the receiver in this suit is to be determined hereafter, but in no event shall said sum, paid as compensation for services to the receiver in this action, together with such sums as may be paid said receiver for services as receiver of other oil and gas properties in suits brought in this court similar to this suit exceed the sum of Five Thousand Dollars per annum.

Done in open court this 20th day of December, 1916.

R. S. BEAN,
District Judge. [110]

[Endorsed]: In Equity—No. A–37. In the District Court of the United States, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Order Appointing Receiver. Filed Dec. 20, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, San Francisco, California. [111]

In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,
Defendants.

Petition for Appeal by the Devil's Den Consolidated Oil Company.

The above-named defendant, Devil's Den Consoli-

dated Oil Company, a corporation, feeling itself aggrieved by the order and decree made on the 20th day of December, 1916, in the above-entitled case, wherein the above-entitled court made its order appointing Howard M. Payne receiver of those certain properties and lands, to wit: The northeast quarter (NE. ¼) of section thirty (30), township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., and situated in Kern County, California, involved in the above-entitled action, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons, and upon the grounds, specified in the assignment of errors, which is filed herewith. Said defendant prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 15th, 1917.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.
OSCAR SUTRO,
Of counsel. [112]

[Endorsed]: In Equity—A–37. In the District Court of the United States in and for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company. Petition for Appeal by the Devil's Den Consolidated Oil

Company. Service of the within Petition for Appeal is hereby acknowledged this 15th of Jan., 1917. E. J. Justice, Albert Schoonover, Frank Hall, Attorneys for Appellees. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendant and Appellant, Devil's Den Consolidated Oil Company, Crocker Bldg., San Francisco. [113]

30073–17

In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, the United States Fidelity & Guaranty Company, a corporation, duly organized and existing and doing business under and by virtue of the laws of the State of Maryland is held and firmly bound unto the above-named respondent, the United States of America, in the sum of Five Hun-

dred Dollars ($500.00), to be paid to said United States of America, for the payment of which, well and truly to be made, the undersigned binds itself, its successors and assigns firmly by these presents.

IN WITNESS WHEREOF, The said United States Fidelity & Guaranty Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact, and its Corporate Seal to be hereunto affixed at San Francisco, California, this 15th day of January, A. D. 1917.

The *condition this* bond is such that whereas the above-named defendant, Devil's Den Consolidated Oil Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the decree and order made [114] in the above-entitled action on the 20th day of December, 1916, appointing Howard M. Payne, receiver of certain properties of the said defendant by the District Court of the United States, for the Southern District of California, Northern Division.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Devil's Den Consolidated Oil Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY COMPANY.

[Seal] By H. B. D. JOHNS,
Attorney-in-fact.

By W. S. ALEXANDER,
Attorney-in-fact.

Approved:

M. T. DOOLING,

Judge.

[Endorsed]: In Equity—No. A–37. In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Undertaking on Appeal. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Devil's Den Consolidated Oil Company, Defendant and Appellant, Crocker Building, San Francisco. **[115]**

In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,

Defendants.

Order Allowing Appeal.

On motion of Joseph D. Redding, Esq., one of the solicitors for the defendant, Devil's Den Consoli-

dated Oil Company, a corporation, and on filing the petition of said defendant for an order allowing an appeal, together with an assignment of errors and a prayer for the reversal of the order appointing a receiver,—

IT IS HEREBY ORDERED that an appeal be, and is hereby, allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the order given and made on the 20th day of December, 1916, and filed in the District Court of the United States for the Southern District of California, Northern Division, appointing Howard M. Payne as Receiver to take charge of the property of said defendant.

IT IS FURTHER ORDERED that a transcript of the record, proceedings, papers and exhibits upon which said order was made, duly authenticated and certified, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at Five Hundred ($500.00), to be approved by the Court. [116]

Dated January 15, 1917.

M. T. DOOLING,
District Judge.

[Endorsed]: In Equity—A-37. In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defend-

ants. Order Allowing Appeal. Service of the within order is hereby acknowledged this 15th day of January, 1917. E. J. Justice, Albert Schoonover, Frank Hall, Attorneys for Appellees. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Devil's Den Consolidated Oil Company, Defendant and Appellant, Crocker Building, San Francisco. [117]

In the District Court of the United States, in and for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,

Defendants.

Assignment of Errors on Appeal of the Devil's Den Consolidated Oil Company, a Corporation, Defendant, and Prayer for Reversal of Order Appointing Receiver.

Now comes the Devil's Den Consolidated Oil Company, a corporation, and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree of the above-entitled United States District Court made

on the 20th day of December, 1916, wherein and whereby one, Howard M. Payne, was appointed receiver of the following described property, to wit: Northeast quarter (NE.¼) of section thirty (30), township twenty-six (26) south, range twenty-one (21) east, M. D. B. & M., and situated in Kern County, California, respectfully represent as grounds of appeal and as assignment of errors herein, and do hereby assign that the above-entitled United States District Court erred in the following particulars:

I.

That the United States District Court erred in making said order and in appointing said receiver.

II.

That said District Court erred in making said order in this that said court had not, nor had the Judge thereof, any jurisdiction to make said order appointing said receiver. [118]

III.

That said District Court erred in not granting the motion of defendant to dismiss the bill of complaint herein.

IV.

That said District Court erred in holding that said District Court had any jurisdiction to try any of the issues involved in the above-entitled action.

V.

That said District Court erred in refusing to grant the motion of defendant to dismiss the bill of complaint on the ground that the sole jurisdiction to determine the issues involved in said action was, at all

times since the commencement of this action, and still is, in the General Land Department of the United States.

VI.

That said District Court erred in holding that the General Land Department of the United States to whom application had been made for patent to the lands involved in said action, did not have exclusive jurisdiction to determine all the issues involved in the above-entitled action.

VII.

That said District Court erred in retaining jurisdiction of the subject matter of said suit and in appointing said Receiver for the reason that the General Land Department of the United States had exclusive jurisdiction to determine all issues in said suit.

VIII.

That said District Court erred in not holding that the General Land Office before whom application for patent to the aforesaid lands were pending was the only tribunal competent and having power and jurisdiction to pass upon the issues involved in the above-entitled action. [119]

IX.

That said District Court erred in holding that it had jurisdiction to determine the question of title to the lands involved in this action when it affirmatively appeared that patent had been applied for by defendants to the lands involved in this action, and there was pending an undetermined contest in the General Land Department of the United States, and

that testimony was being taken in said contest in said General Land Department of the United States, upon the question as to whether or not these defendants were entitled to a patent to said lands.

X.

That said District Court erred in refusing to grant the motion of said defendants to dismiss the bill of complaint on the ground that the Court had no jurisdiction to try the issues involved in said suit for the reason that the defendant, Devil's Den Consolidated Oil Company, long prior to the commencement of the above-entitled action did duly make and file its application for patent to said lands in the proper land office of the United States, as Visalia, California, wherein and whereby it did apply to the United States of America and to the General Land Department thereof in accordance with the laws of the United States of America and the rules and regulations of the Department of the Interior in reference thereto; upon which said application for patent, issue had been joined by the United States; and which said application for patent was, at the time of the making of said order appointing said receiver, to wit, on the 20th day of December, 1916, and, at the time of the hearing of said motion of said defendant to dismiss said bill of complaint and of the motion for a receiver, to wit, on the 21st, 22d, 23d, 24th, 25th, 28th and 29th days of August, 1916, still pending in the Land Department of the United States and undetermined, and the [120] evidence upon the hearings of said application for said patents was still in process of be-

ing taken in the General Land Department of the United States.

XI.

That said District Court erred in making said order and decree and appointing said Receiver in that long prior to the commencement of said action the defendant, the Devil's Den Consolidated Oil Company, had bought the land involved in said action from the plaintiff, had paid the full purchase price therefor and had received a receipt from the plaintiff for said purchase price.

XII.

That said District Court erred in refusing to grant the motion of the said defendant to dismiss said action, and furthermore erred in making said order appointing a receiver in this that the said Court never has had, and has not at the present time, any jurisdiction of the subject matter in this action.

XIII.

That said District Court erred in holding and in construing the above-entitled action as one brought for ancillary relief.

XIV.

That said District Court erred in holding that upon the complaint filed in the above-entitled action, it had jurisdiction to grant relief by the appointment of a receiver as ancillary to the proceedings in the General Land Department of the United States.

XV.

That said District Court erred in not holding that it had no jurisdiction to grant the ultimate relief asked for in the bill of complaint, and therefore

that it had no jurisdiction to grant ancillary relief by the appointment of a receiver. [121]

XVI.

That said District Court erred in appointing a receiver upon the bill of complaint as filed and regarding the action as ancillary to the proceedings in the Land Department, whereas this action, as a matter of fact, was and is in opposition to and in disregard of the proceedings in the Land Department.

XVII.

That said District Court erred in making said order appointing said receiver in this that said Court abused its discretion and committed an abuse of discretion in making said order.

XVIII.

That said District Court erred in making said order in that the complaint of plaintiff in said action did not show facts justifying the appointment of a receiver.

XIX.

That said District Court erred in directing the receiver to take charge of the oil and gas produced from said lands and to dispose of the same, and in directing the defendant to pay over to the receiver the proceeds of the sale of oil or gas produced from said lands.

XX.

That said District Court erred in holding that the complainant was not amply protected as to all of its rights in the General Land Department of the United States by reason of the applications for patents to said land involved herein on the part of the defend-

ant, Devil's Den Consolidated Oil Company herein, and the application on the part of defendant for leases under the terms and provisions of the Act of Congress of August 25th, 1914, entitled "An Act to Amend an Act Entitled 'An Act to Protect the Locators in Good Faith of Oil and Gas Land Who Shall Have Effected an Actual Discovery of Oil or Gas on the Public Lands of the United States, or their Successors in Interest,' [122] approved March 2d, 1911."

XXI.

That said District Court erred in making said decree and order appointing a receiver in said action in that the complaint contains no allegation that the properties in question have been, or are being mismanaged, nor was any evidence introduced, nor did the Court hold that the said properties have not been, or are not being properly and economically managed, and furthermore, the complaint in this action does not allege, nor did the evidence offered at the hearing of said application, show, or tend to show that any of the defendants are insolvent, nor was any evidence offered or introduced to show, nor did the Court hold that in the management and operation of said properties said defendants conducted such management and operation in any manner different from the management and operation thereof as the same could, would or should be conducted by any receiver who might be appointed in the premises.

XXII.

That said District Court erred in making said order and decree in that said order is against the

evidence presented at the hearing of said motion for a receiver.

XXIII.

That said District Court erred in making said order and decree appointing said receiver in that said order and decree is against law.

WHEREFORE the defendant, Devil's Den Consolidated Oil Company, a corporation, prays that said order appointing said receiver herein may be directed to be expunged from the records of said District Court for want of jurisdiction in said court to give and make said order appointing a receiver, and that the order appointing said receiver be corrected and reversed and the receiver discharged, and all moneys and properties received [123] by said receiver from these defendants be returned to them; in order that the foregoing assignment of errors may be and appear of record the defendants above named present the same to this Court and pray that such disposition may be made thereof as by the law and statutes of the United States in such case made and provided.

Dated January 15th, 1917.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant, Devil's Den Consolidated Oil Company.
OSCAR SUTRO,
Of Counsel.

[Endorsed]: In Equity—No. A-37. In the District Court of the United States, in and for the Southern District of California, Northern Division,

Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants. Assignment of Errors on Appeal. Service of the within Assignment of Errors is hereby acknowledged this 15th day of January, 1917. E. J. Justice, Albert Schoonover, Frank Hall, Attys. for Appellees. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendant and Appellant, Devil's Den Consolidated Oil Company, Crocker Building, San Francisco. [124]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth, Circuit.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,

Defendants.

Stipulation Re Allowance of Appeal, etc.

It is hereby stipulated between the parties hereto that the petition for appeal and assignment of errors in the above-entitled action may be presented for allowance by the defendant, Devil's Den Consoli-

dated Oil Company, a corporation, to the Honorable Maurice T. Dooling, regularly sitting by special assignment in the above-entitled court in special session held in the city and county of San Francisco, State of California, and that said Honorable Maurice T. Dooling may sign and allow said appeal, while sitting as aforesaid by special assignment in said special session in said city and county of San Francisco, State of California, and may sign the order allowing the appeal and the citation on appeal and approve the bond furnished by said defendants on appeal, and

It is further stipulated that no objection or advantage shall be taken of the fact that the Court is holding special session in the city and county of San Francisco, State of California, and that the said appeal and the allowance thereof are presented and allowed by a Judge of said Court, other than the Judge who made the order from which this appeal is taken. [125]

Dated January 15th, 1917.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for the Devil's Den Consolidated Oil Company, Defendant and Appellant.

E. J. JUSTICE,
ALBERT SCHOONOVER,
FRANK HALL,
Solicitors for Complainant and Respondent.

OSCAR SUTRO,
Of Counsel.

[Endorsed]: In Equity—No. A-37. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company and Standard Oil Company, Defendants. Stipulation on Appeal. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendant and Appellant, Devil's Den Consolidated Oil Company, Crocker Building, San Francisco. [126]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.
DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants and Appellants.

Stipulation and Order Enlarging Time to and Including March 18, 1917, for Filing Statement of Evidence.

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, that the defendants and

appellants, Devil's Den Consolidated Oil Company, a corporation, may have up to and including the 18th day of March, 1917, within which to file for approval its statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated February 13, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General.
A. E. CAMPBELL,
Special Assistant to the Attorney General.
FRANK HALL,
Special Assistant to the Attorney General.
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

M. T. DOOLING,
District Judge. [127]

[Endorsed]: Original. In Equity—No. A-37. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company et al.,

Defendants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed Feb. 16, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & & Brobeck, Crocker Building, San Francisco, Solicitors for Defendants. [128]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants and Appellants.

Stipulation and Order Enlarging Time to and Including May 18, 1917, for Filing Statement of Evidence.

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Devil's Den Consolidated Oil Company, a corporation, may have up to and including the 18th day of May, 1917, within which to file for approval its statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have

ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated March 12, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

M. T. DOOLING,
District Judge. [129]

[Endorsed]: Original. In Equity—No. A–37. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company et al., Defendants. Stipulation and Order Enlarging Time for Filing Statement of Evidence. Filed Mar. 13, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding, and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Solicitors for Defendants. [130]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants and Appellants.

Stipulation and Order Enlarging Time to and Including July 18, 1917, for Filing Statement of Evidence.

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Devil's Den Consolidated Oil Company, a corporation, may have up to and including the 18th day of July, 1917, within which to file for approval its statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the Clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated May 14th, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

M. T. DOOLING,
District Judge. [131]

[Endorsed]: In Equity—No. A–37. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff and Appellee, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Defendants and Appellants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed May 15, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Joseph D. Redding, Morrison, Dunne and Brobeck, Attorneys for Defendant, Devil's Den Consolidated Oil Company, Crocker Bldg., San Francisco. [132]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants and Appellants.

Stipulation and Order Enlarging Time to and Including September 18, 1917, for Filing Statement of Evidence.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors in the above-entitled cause, that the defendants and appellants, Devil's Den Consolidated Oil Company, a corporation, may have up to and including the 18th day of September, 1917, within which to file for approval its statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated July 6, 1917.

ALBERT SCHOONOVER,
United States Attorney.
E. J. JUSTICE,
Special Assistant to the Attorney General.
FRANK HALL,
Special Assistant to the Attorney General.
_____,
Special Assistant to the Attorney General.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

WM. W. MORROW,
District Judge. [133]

[Endorsed]: In Equity—No. A–37. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Ptf. and Appellee, vs. Devil's Den Consolidated Oil Company, Associated Oil Company, and Standard Oil Company, Dfts. and Appellants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed Jul. 14, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants and Appellants. [134]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.
DEVIL'S DEN CONSOLIDATED OIL COMPANY,
Defendant and Appellant.

Stipulation and Order Enlarging Time to and Including November 18, 1917, for Filing Statement of Evidence.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, that the defendant and appellant, Devil's Den Consolidated Oil Company, a corporation, may have up to and including the 18th day of November, 1917, within which to file for approval its statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement with the clerk of the above-entitled court within which to file objections and proposes amendments thereto.

Dated September 10, 1917.

ALBERT SCHOONOVER,
United States Attorney,
HENRY F. MAY,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
_____,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.

It is ordered.

WM. H. HUNT,
Judge. [135]

[Endorsed]: In Equity—No. A-37. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Defendant. Stipulation Enlarging Time for Filing Statement of Evidence. Filed Sep. 14, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Solicitors for Defendants. [136]

In the District Court of the United States, for the Southern District of California, Northern Division.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY,
Defendants.

IN EQUITY—No. A–52.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOST HILLS MINING COMPANY, UNIVERSAL OIL COMPANY and ASSOCIATED OIL COMPANY,
Defendants.

IN EQUITY—No. A–57.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNIVERSAL OIL COMPANY,
Defendants.

Stipulation for but One Transcript of the Record and Statement of Evidence on Appeal, as to the Use Thereof on Appeal, and for the Time of Filing of Statement of Evidence.

IT IS HEREBY STIPULATED and agreed by and between the parties in the above-entitled causes, by their respective counsel, [137] that in perfecting the record for appeals of the above-entitled causes, to the United States Circuit Court of Appeals, only one record of the statement of the evidence to be incorporated in the record on appeal, shall be required, to wit: the statement of the evidence in case No. A–52; such record to include such of the clerk's records in each of said within causes as desired by either of the parties; and one statement of the evidence introduced upon the hearing of the application for a receiver in said causes, the same having been at that time consolidated for said hearing, and such record when so approved may be used by the defendants, or either of them, or by the plaintiff as the record on appeal in either or all of such causes, when and where applicable and relevant.

IT IS FURTHER STIPULATED by and between the parties in the above-entitled causes that the defendants therein may have until the 30th day of October, 1917, within which to file for approval its statement of the evidence to be included in the

record on appeal as provided for in equity rule No. 75.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.
ROBERT O'CONNOR,
United States Attorney,
HENRY F. MAY,
FRANK HALL,
Special Assistants to the Attorney General,
Solicitors for the Plaintiff and Appellee. [138]

[Endorsed]: In the District Court of the United States for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Co. et al., Defendants. No. A–37. United States of America, Plaintiff, vs. Lost Hills Mining Company et al., Defendants. No. A–52. United States of America, Plaintiff, vs. Lost Hills Mining Company et al., Defendants. No. A–57. Stipulation for but One Transcript of the Record and Statement of Evidence on Appeal, as to the Use Thereof on Appeal, and for the Time of Filing of Statement of Evidence. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants. [139]

In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit.

Honorable ROBERT S. BEAN, Judge Presiding.

IN EQUITY—No. A–37.

UNITED STATES OF AMERICA,
Complainant,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY et al.,
Defendants.

IN EQUITY—No. A–52.

UNITED STATES OF AMERICA,
Complainant,

vs.

LOST HILLS MINING COMPANY, UNIVERSAL OIL COMPANY, and ASSOCIATED OIL COMPANY,
Defendants.

IN EQUITY—No. A–57.

UNITED STATES OF AMERICA,
Complainant,

vs.

LOST HILLS MINING COMPANY and UNIVERSAL OIL COMPANY,
Defendants.

Stipulation for Approval of Statement of Evidence.

[140]

IT IS STIPULATED by and between the parties to this cause, through their respective solicitors, that the foregoing statement of evidence may be approved by the Court or Judge, as the statement of evidence to be used for the purposes of defendants' appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States," and the complainant (United States of America) hereby expressly waives its right to have the statement of the evidence first lodged in the clerk's office for its examination, and further waives its right to the ten days' notice of the time and place when and where the defendants will ask the Court or Judge to approve the same, as provided in and by said Rule 75.

ROBERT O'CONNER,
United States District Attorney,
HENRY F. MAY,
Special Assistant to the Attorney General.
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Complainant.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants. **[141]**

[Endorsed]: A–37—Eq. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United

States of America, vs. Devil's Den Consolidated Oil Company et al. In Equity—No. 37. United States of America vs. Lost Hills Mining Company et al. In Equity—Nos. A–52, A–57. Stipulation for Approval of Statement of Evidence. Filed Oct. 1, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Albert Schoonover, U. S. Dist. Atty., Frank Hall, Henry F. May, Special Assistants to the Attorney General, Solicitors for Complainant. Joseph D. Redding, Morrison, Dunne & Brobeck, Solicitors for Defendants. [142]

In the District Court of the United States for the Southern District of California, Northern Division.

A–37.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL CO., ASSOCIATED OIL COMPANY, and STANDARD OIL COMPANY, Corporations,

Defendants.

Notice of Election by Defendant Devil's Den Consolidated Oil Company as to Printing of Record.

The Devil's Den Consolidated Oil Company, a corporation, being the appellant in the above-entitled cause from an order of said Court to the United States Circuit Court of Appeals for the Ninth Circuit,

hereby gives notice that they elect to take and file in the said Appellate Court, to be printed under the supervision of its clerk, under its rules, a transcript of such portions of the record as may be duly settled under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States," duly authenticated, and also in accordance with the stipulation heretofore filed in this cause employing the record of the transcript of proceedings in case A–52 as provided in said stipulation.

Dated October 16, 1917.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants. [143]

[Endorsed]: A–37. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Co. et al., Defendants. Notice of Election by Defendant as to Printing of Record. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding, and Morrison, Dunne and Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants. [144]

In the District Court of the United States, for the Southern District of California, Northern Division.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, ASSOCIATED OIL COMPANY and STANDARD OIL COMPANY,
Defendants.

Amended Praecipe for Transcript on Appeal by Defendant Devil's Den Consolidated Oil Company, a Corporation.

To William M. Van Dyke, Clerk of the District Court of the United States, for the Southern District of California, Northern Division:

Please prepare and duly authenticate for the appeal of the defendant, Devil's Den Consolidated Oil Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, from the order appointing a receiver in the above-entitled suit entered on December 21, 1916, a transcript incorporating the following portions of the record therein and none other:

1. Bill of Complaint.
2. Answer of Defendant Devil's Den Consolidated Oil Company to the Bill of Complaint.
3. Amended Answer of Defendant Devil's Den

Consolidated Oil Company to the Bill of Complaint.

4. Answer of the Devil's Den Consolidated Oil Company and Associated Oil Company to the Bill of Complaint.
5. Notice of Motion to have the Jurisdictional Defense of the Defendants Separately Heard and Disposed of.
6. Notice of Motion for Restraining Order and Appointment of Receiver. **[145]**
7. Hearing Orders Entered July 28, 1916.
8. Three Motions Filed August 15, 1916, and Orders Thereon.
9. Orders on Hearing August 16, August 17, August 21, August 22, August 23, August 24, August 25, August 28, August 29, 1916.
10. Hearing Order of October 4, 1916.
11. Order December 21, 1916, Appointing Howard M. Payne, Receiver.
12. The Petition of Devil's Den Consolidated Oil Company for Its Said Appeal.
13. Undertaking on Appeal.
14. Order Allowing Appeal.
15. Assignment of Errors for Such Appeal.
16. The Orders of the Court or Judge Allowing Such Appeal.
17. The Citation Issued on such Appeal Showing Service Thereof.
18. Each and All of the Several Stipulations Entered into Between Counsel Extending the Return Day of the Citation; Stipulations Extending the Time in Which the State-

ment of Evidence to be Incorporated in the Record on Appeal Shall be Filed; Stipulation With Reference to Consolidating the Record and Printing of One Transcript Thereof in the Above-entitled Case, and also in A–52 and A–57; All Stipulations With Reference to Perfecting the Appeal in the Above-entitled Case.

19. Stipulation Entered into in the Above-entitled cause, and also in A–52 and A–57 for the Approval of Statement of Evidence.
20. Notice of Election by Defendants and Appellants as to Printing Record.
21. This Amended Praecipe.

Dated Los Angeles, California, November 7th, 1917.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants. [146]

[Endorsed]: In Equity—A–37. In the District Court of the United States for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Company, Associated Oil Company and Standard Oil Company, Defendants. Amended Praecipe for Transcript on Appeal.

Due service upon plaintiff with a copy of the foregoing Amended Praecipe at San Francisco, California, on this 7th day of November, 1917, is hereby acknowledged, and the ten days' notice provided for

in Equity Rule No. 75 is hereby waived.

_____,
United States District Attorney.
FRANK HALL,
Special Assistant to the Attorney General, Solicitor for the Plaintiff.

Filed Nov. 8, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding, and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants. [147]

In the District Court of the United States of America, in and for the Southern District of California, Northern Division.

IN EQUITY—No. A–37.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, and STANDARD OIL COMPANY, a Corporation,
Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify

the foregoing one hundred and forty-seven typewritten pages, numbered from 1 to 147, inclusive, and comprised in one volume, to be a full, true and correct copy of the record, proceedings and papers upon which the order and decree made on the 20th day of December, 1916, in the above-entitled case, wherein the above-entitled court made its order appointing Howard M. Payne, Receiver, and that the same, together, constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the appellant, Devil's Den Consolidated Oil Company, a corporation, by its solicitors of record.

I do further certify that the cost of the foregoing record is $49.40, the amount whereof has been paid me by Devil's Den Consolidated Oil Company, a corporation, the appellant herein. [148]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, this 11th day of December, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-second.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [149]

[Endorsed]: No. 3094. United States Circuit Court of Appeals for the Ninth Circuit. Devil's Den Consolidated Oil Company, a Corporation, Appel-

lant, vs. The United States of America, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed December 17, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, et al.,
Defendants and Appellants,
vs.
UNITED STATES OF AMERICA,
Plaintiff and Appellee.

Stipulation and Order Enlarging Time to and Including March 18, 1917, to Return Citation.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, which case is In Equity No. A–37, in the District Court of the United States for the Southern District of California, Northern Division, that the defendant and appellant, Devil's Den Consolidated Oil Company, may have up to and including the 18th day of March, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that

the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and included said 18th day of March, 1917.

Dated February 13, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.

Order.

This cause coming on to be heard upon the application of the Devil's Den Consolidated Oil Company, defendant and appellant, for an enlargement of the return of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of March, 1917;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the

same hereby is enlarged and extended up to and including the 18th day of March, 1917.

Dated February 15, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Original. In the United States Circuit Court of Appeals, Ninth Judicial District. Devil's Den Consolidated Oil Company, et al., Appellants, vs. United States of America, Appellee. Stipulation Enlarging Time to Return Citation, and Order. Filed Feb. 15, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, et al.,
Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

Stipulation and Order Enlarging Time to and Including May 18, 1917, to Return Citation.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, which case is In Equity No. A–37, in the District Court of the United States for the Southern District of California, Northern Division, that the defendant and appellant, Devil's Den

Consolidated Oil Company, may have up to and including the 18th day of May, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of May, 1917.

Dated March 12, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.

Order.

This cause coming on to be heard on application of the Devil's Den Consolidated Oil Company, defendant and appellant, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed

herein providing that the return day on such citation may be extended up to and including the 18th day of May, 1917, and that the appellant may have up to and including said 18th day of May, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of May, 1917, and the said appellant is hereby given up to and including the said 18th day of May, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 12, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Devil's Den Consolidated Oil Company, et al., Appellants, vs. United States of America, Appellee. Stipulation Enlarging Time to Return Citation. Order. Filed Mar. 12, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, et al.,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Stipulation and Order Enlarging Time to and Including July 18, 1917, to Return Citation.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, which case is In Equity No. A–37, in the District Court of the United States for the Southern District of California, Northern Division, that the defendant and appellant, Devil's Den Consolidated Oil Company, may have up to and including the 18th day of July, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of July, 1917.

Dated May 14th, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.

Order.

This cause coming on to be heard on application of the Devil's Den Consolidated Oil Company, defendant and appellant, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of July, 1917, and that the appellant may have up to and including said 18th day of July, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit

Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of May, 1917, and the said appellant is hereby given up to and including the said 18th day of July, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 14, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Devil's Den Consolidated Oil Company, et al., Appellants, vs. United States of America, Appellee. Stipulation Enlarging Time to Return Citation and Order. Filed May 17, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, et al.,
Defendants and Appellants,
vs.
UNITED STATES OF AMERICA,
Plaintiff and Appellee.

Stipulation and Order Enlarging Time to and Including September 18, 1917, to Return Citation.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in

the above-entitled cause, which case is In Equity No. A–37, in the District Court of the United States for the Southern District of California, Northern Division, that the defendant and appellant, Devil's Den Consolidated Oil Company, may have up to and including the 18th day of September, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of September, 1917.

Dated July 6, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
_____,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.

Order.

This cause coming on to be heard on application of the Devil's Den Consolidated Oil Company, defendant and appellant, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript

on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of September, 1917, and that the appellant may have up to and including said 18th day of September, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of September, 1917, and the said appellant is hereby given up to and including the said 18th day of September, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 13, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: In Equity—No. ——. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Devil's Den Consolidated Oil Company et al., Dfts. and Appellants, vs. United States of America, Ptf. and Appellee. Stipulation Enlarging Time to Return Citation. Order. Filed Jul. 13, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, et al.,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Stipulation and Order Enlarging Time to and Including November 18, 1917, to Return Citation.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, which case is In Equity No. A–37, in the District Court of the United States for the Southern District of California, Northern Division, that the defendant and appellant, Devil's Den Consolidated Oil Company, may have up to and including the 18th day of November, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of November, 1917.

Dated September 10, 1917.

ALBERT SCHOONOVER,
United States Attorney,
HENRY F. MAY,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
_____,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendant and Appellant.

Order.

This cause coming on to be heard on application of the Devil's Den Consolidated Oil Company, defendant and appellant, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of November, 1917, and that the appellant may have up to and including said 18th day of November, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit

Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of November, 1917, and the said appellant is hereby given up to and including the said 18th day of November, 1917, within which to file its transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 10, 1917.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Devil's Den Consolidated Oil Company, Dfts. and Applts. vs. United States of America, Ptf. and Appellee. Stipulation Enlarging Time to Return Citation. Order. Filed Sep. 12, 1917, F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

IN EQUITY—No. D. C. A–37.

DEVIL'S DEN CONSOLIDATED OIL COMPANY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including December 18, 1917, to File Record and Docket Cause Under Subdivision 1 of Rule 16.

Upon application of Mr. Joseph D. Redding, counsel for the appellants, and good cause therefor appearing, it is ORDERED that the return day of the Citation on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby enlarged and extended to and including the 18th day of December, 1917, and the said appellants are hereby given up to and including the said 18th day of December, 1917, within which to file their Transcript of Record on Appeal, and docket the above-entitled cause in this court.

San Francisco, California, November 7, 1917.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Inclg. Dec. 18, 1917, to File Record Thereof and to Docket Case. Filed Nov. 7, 1917. F. D. Monckton, Clerk.

No. 3094. United States Circuit Court of Appeals for the Ninth Circuit. Six Orders Under Rule 16 Enlarging Time to Dec. 18, 1917, to File Record Thereof and to Docket Case. Refiled Dec. 17, 1917. F. D. Monckton, Clerk.

No. 3094

12

United States Circuit Court of Appeals

For the Ninth Circuit

DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

MORRISON, DUNNE & BROBECK,
JOSEPH D. REDDING,
Attorneys for Defendants and Appellants.

Filed this.....day of February, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

TOWN TALK PRESS

No. 3094

United States Circuit Court of Appeals

For the Ninth Circuit

DEVIL'S DEN CONSOLIDATED OIL COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT

This is an appeal from an order appointing a receiver of some oil land in Kern County, California (Tr., p. 107). The property is described in the bill of complaint as the northeast quarter of section thirty in Township 26 South, Range 21 East, Mount Diablo Base and Meridian (Tr., p. 5).

The proceeding at bar is a suit in equity to quiet the title of the appellee, plaintiff below, to have it adjudged that the defendants have no title to the property, and that the lands are the perfect property of the plaintiff free and clear of the claims of defendants, and to enjoin the defendants from com-

mitting any trespass or waste upon the lands (Tr., pp. 11-12). As an incident to this ultimate relief, a receiver *pendente lite* was applied for (Tr., pp. 12-13).

Courts of equity do not entertain suits for a receivership merely. A receivership is an incident in the exercise of a principal jurisdiction; it is something ancillary. If the court is without jurisdiction to hear and determine the main subject matter, it is without power to appoint a receiver. (*Hutchinson v. American Palace Car Co.*, 104 Fed. 128; *Condon v. Mutual Life Assn.*, 89 Md. 99.)

As to the bill of complaint: (Tr., pp. 4-14.) The presidential withdrawal of public land from mineral exploration—covering an area inclusive of the land in suit—by the proclamation of September 27, 1909, is alleged in the bill. It is said that notwithstanding the withdrawal, and in violation thereof, and "long subsequent to the 27th day of September, 1909," the Devil's Den Consolidated Oil Company entered upon this land for the purpose of exploring it for oil and gas. No discovery of oil was made, it is said, until the latter part of 1910; and it is alleged that the defendant "is now extracting oil from said land, boring oil and gas wells, and otherwise *trespassing* upon said land."

It is further said that the defendants claim some title to the land, but the claim is derived directly or mediately from some pretended notice or notices

of mining location, and by conveyance, contract or lien directly or mediately from the pretended locators. None of such location notices, it is said, are valid against the plaintiff, and no rights have accrued thereunder.

The location notice is referred to with more particularity. It is said that it was filed and posted for the benefit of the company by dummy locators, who afterward conveyed the land to the company. The date of the location notice is given as February 13, 1907.

There is not one word in the bill about any proceedings in the Land Department, supervening upon this location notice or otherwise. The bill is silent about the existence of any proceedings whatever in the Land Department.

Having alleged that the defendant entered upon the land long after September 27, 1909, the bill adds redundantly that the defendants at the time of the withdrawal, were not bona fide occupants or claimants of the land in diligent prosecution of discovery work. In plain English, they are proceeded against as tresspassers, and the pretended location notice from which they assume to derive some interest, is said to be invalid, the work of mere dummies.

But the answer and the proofs reveal that this is no mere case of trespass upon public land, as was the El Doro case, 229 Fed. 946, which went off upon the sufficiency of a complaint framed very

much like the present one. The answer and the proofs reveal that this is the precise case of a mineral application now pending in the Land Department, and of which the Land Department is now in the actual exercise of jurisdiction.

The answer first joins issue on the averments of the bill (Tr., pp. 27-34). It sets up that the grantors of defendant made a valid discovery of minerals on this quarter section, and located it as a mining claim on February 13, 1907, and defendant has held and worked it for five years prior to the commencement of this suit, and is entitled to a patent under Section 2332, Revised Statutes (Tr., pp. 34-5).

It is further alleged, as a separate defense, that the court has no jurisdiction, and in this behalf, the Land Office proceedings are set forth. The answer alleges the location of the northeast quarter of section thirty, the recordation of the notice of location, and the assignment by the locators to the Devil's Den Consolidated Oil Company (Tr., pp. 36-7). It alleges the occupancy of the property, the assessment work, the discovery of gypsum, the drilling for oil, and the discovery of a producing well of some three hundred barrels per day, the expenditure of five hundred dollars in developing the gypsum, and of three thousand dollars and over in developing the oil.

The application for patent will not be found in the transcript of the present case, No. 3094. It will

be found in the consolidated statement on appeal, applicable as well to this case as to the Lost Hills cases, and printed in the transcript of No. 3095. The patent application in the present case is set forth at pages 503 *et seq.*, transcript in 3095, and recites that the Devil's Den Consolidated Company and its predecessors in title "have, ever since the location of said placer mining claim, to wit: February 13, 1907, been in the actual bona fide possession of said land, working and holding and claiming the same as a placer mineral claim, and developing the placer minerals therein contained under the mining laws of the United States."

Now, then, the answer in the present case alleges that on August 2, 1911, the Devil's Den Company filed this application for patent in the United States Land Office at Visalia "wherein and whereby it did apply to the United States of America and to the General Land Department thereof, in accordance with the requirements of law, for a patent to said northeast quarter" (Tr., 3094, pp. 38-9).

The statutory proceedings and requirements in the way of a showing to the Land Office, and of supporting affidavits, are set forth with particularity (Tr., pp. 39-41). The publication and posting of notice, and the proofs in that behalf, are made to appear (Tr., pp. 41-2). The payment of the purchase price, the issuance of the receiver's receipt, and the forwarding of a duplicate receipt, with the

record in the matter of such application, to the General Land Office, and the pendency of the proceedings therein ever since,—all this is alleged (Tr., pp. 43-4).

It further appears that on September 2, 1915, the defendant was notified that a special agent of the United States Land Office had filed charges against the validity of this application entry; that the company has joined issue upon the charges; that no decision has been made, as yet, by the Commissioner or the Secretary, and the application is pending and undisposed of (Tr., p. 44). These charges go upon the very thing alleged against the entry in the bill, namely: that the applicant was not in diligent prosecution of work leading to discovery of oil or gas at the date of the withdrawal (Tr., pp. 46-7; p. 8). There is no reference in the bill of complaint to gypsum. The answer alleges, as well a discovery of gypsum as of oil—in this respect following the application for patent. The charges in the Land Department go also to the matter of gypsum, and allege that the claim of a gypsum discovery is a subterfuge for obtaining title to valuable oil land (Tr., p. 47). The charge made in the bill of complaint as to the dummy character of the location, is duplicated in the charges filed in the Land Office (Tr., pp. 47-8).

In a word, the Land Department now has before it, and upon issues regularly joined for trial, the

very matters upon which this bill depends, namely: our diligent prosecution of work leading to the discovery of oil, and the *bona fides* of the original location; and an additional question, not raised by the bill, touching the sufficiency of this gypsum discovery. There are two proceedings, parallel and concurrent, going on *pari passu*, the proceeding now before the court on this bill and answer, and the proceeding pending and at issue in the Land Department, in both of which the same questions are up for trial, and in both of which the ultimate relief is the decision, one way or the other, on the matter of the title to the property. Can such things be? Has the jurisdiction been committed to both tribunals? Is it a race of diligence, seemly or unseemly, for the first and faster determination? This is one of the questions presented by this record.

If the jurisdiction should be held to be in the Land Department, then the court is without that primary jurisdiction to which is drawn and upon which is rested, its auxiliary and incidental jurisdiction to appoint a receiver. Judge Bean held that he had this primary jurisdiction, with its incidental power to appoint a receiver. But he went on to say, that if he was wrong about that, he would be authorized to appoint a receiver pending the determination of the proceedings in the Land Department. His thought was, that the Land Department had no equity powers of injunction or re-

ceivership, and that the court would be justified, as an incident and an aid to the jurisdiction of the Department, in appointing a receiver pending a determination by the Department. The conclusive answer, it is believed, is, that the bill in this case is not framed on any such theory.

ASSIGNMENT OF ERROR

The assignments of error are really gathered up in the two questions which have just been suggested: First, did the court have jurisdiction to adjudicate the title to the property, while that very question was pending in the Land Department on an application for patent? And, second, did the court have jurisdiction to appoint a receiver, in aid of the proceedings in the Land Department, upon a bill framed like the bill in the present case? We proceed at once to the argument of these questions:

ARGUMENT:

I.

The court had no general or primary jurisdiction to adjudicate the title to this property, while that very question was pending in the Land Department on an application for patent.

It is conceded by Judge Bean that if this were a contest between private parties, the payment of the purchase price would vest the equitable title

in the applicant, with a *prima facie* right to a patent. He says:

> "In a contest between private parties over the title or right to the possession of mining property for which patent has not been issued, the doctrine invoked would no doubt be applicable."

He is referring to the doctrine that the payment of the purchase price "was in effect a judgment *in rem*, and vested the equitable title to the land in the defendants, subject only to the appellate jurisdiction of the land department." He goes on:

> "Where the necessary steps are taken by a qualified applicant to obtain a patent to mining land, and no adverse claim has been filed, the applicant becomes vested with the equitable title and a *prima facie* right to a patent immediately upon the payment of the purchase price, and the delay of the Department in issuing patent does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." He cites *Benson Mining Company v. Alta Mining Company*, 145 U. S. 428; also the case of *El Paso Brick Company v. McKnight*, 233 U. S. 250, referred to by this court in its recent opinion in *Consolidated Mutual Oil Co. v. United States*, No. 2787.

> "But," continues Judge Bean, "such a proceeding does not divest the government of its title, nor is it an adjudication as between the claimant and the government." (Decision below, 236 Fed., p. 975.)

It is believed, with deference, that the learned judge fell into error. The proceeding does, it is submitted, divest the government of the equitable title, subject always, until patent issues, to the unspent jurisdiction of the Department by appellate proceedings within the Department itself, to reexamine, and, if need be, to annul the entry. The very case cited by Judge Bean, *Benson Mining Company v. Alta Mining Company*, 145 U. S. 428, is clear to the point.

> "The equitable title," says Mr. Justice Brewer in that case, "accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

And, further:

> "It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

And again:

> "There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him."

Or, as was said by the Supreme Court of Wisconsin in *Cornelius v. Kessel*, 16 N. W. 550:

> "The learned counsel for the plaintiff insisted there was a distinction between the case where the purchaser obtains the Register's final certificate, and where he merely holds the Receiver's receipt. But both instruments stand upon the same footing. *The purchaser's rights are founded on the contract of purchase and payment of money*, and the statutes of this State have always given the same effect to both instruments as evidence of title, and there is no earthly reason that we perceive for making a distinction between them, so far as the rights of the purchaser are concerned."

Cornelius v. Kessel went to the Supreme Court of the United States, 128 U. S. 456. The jurisdiction of the Land Department, by appellate proceedings, to correct and annual entries of land allowed in the first instance by the Register and Receiver—precisely the jurisdiction now in exercise, in the case at bar, upon charges formally preferred—is fully sustained. It is said, at page 461 of the opinion:

> "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, *undoubtedly authorizes him to correct and annul entries of land allowed by them*, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such *entry and payment* the purchaser secures a *vested interest* in the property *and a right to a patent* therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property."

If the government is not, as Judge Bean has put it, an adverse party, it is something very much more—it is a voluntary party, a vendor of real estate who retains the legal title as a trustee for the vendee in whom has been vested, by voluntary action of the vendor, the equitable title and estate.

In *Cosmos Exploration Co. v. Grey Eagle Oil Co.*,

104 Fed., p. 40, it appeared from the bills of complaint—as it appears here from the answer and proofs below—that the entries in question were being contested, "and that those contests are still pending in the Land Department." Said Judge Ross:

> "No court can lawfully anticipate what the decision of the Land Department may be in respect to the contest, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact, such as is that relating to the character of any particular piece of land."

And in *Marquez v. Frisbie*, 101 U. S. p. 475, the court said:

> "That principle is, that the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal *within* that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title *afterwards* comes in question. But in this class of cases, as in all others, there exists in the courts of equity, the jurisdiction to correct mistakes, to relieve against and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belong to another, to give appropriate relief."

Citing *Moore v. Robbins*, 96 U. S. 530, *Shepley v. Cowan*, 91 U. S. 330, and *Johnson v. Towsley*,

13 Wall., 72—all three of them were cases where the patent had issued, the jurisdiction of the Department had been spent, and thereupon the jurisdiction of the courts attached.

As Mr. Justice Brewer aptly expressed it, in speaking of canceled entries of timber lands:

> "The statute provides that if an entry is wrongfully made it may, *prior to patent*, be set aside by the Land Department, the entryman forfeiting the money which he has paid. In other words, *by the action of the department, the equitable title is canceled and restored to the government.*" (*U. S. v. Detroit Lumber Co.*, 200 U. S. p. 339.)

> "It is clear," said the Supreme Court of the United States in *U. S. v. Schurz*, 102 U. S. 401, "that the right and the duty of deciding all such questions belong to those officers (of the Land Department), and the statutes have provided for *original* and *appellate* hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction."

Here, then, is a case in which the entry had been made, the purchase price paid, the receiver's receipt issued, and the equitable title vested. That equitable title was questioned by charges preferred within the Department, presenting questions peculiarly of departmental cognizance—the question of the diligent prosecution of work leading to the discovery of oil, as of the date of the presidential

withdrawal; and the question of the *bona fides* of the location. It was these questions precisely upon which the bill of complaint is made to turn. The two controversies, investigating the same questions, are going on concurrently; indeed, the controversy is not only depending as well in the Land Department as in the court, but issues have been made up, and the case is ready for trial before the Department. As Judge Ross said in *Cosmos Exploration Co. v. Grey Eagle Oil Co., supra*, "no court can lawfully anticipate what the decision of the land department may be in respect to the contest, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact."

Judge Bean, it is true, in the opinion below, refers to some decisions of the Supreme Court. But they are all cases in which the patent had issued, the jurisdiction of the Department had been exercised and exhausted. He cites no case where the Department, on an appellate proceeding within the Department, is exercising its jurisdiction to review and annul an entry allowed, in the first instance, by the local land office, and where at the same time the jurisdiction of a court has been sustained, prior to patent, to review and annual that same entry upon a consideration of the precise question which the Department is hearing and determining. No

such case, it is believed, could be cited, for no such decision can be found.

It is submitted, therefore, that the court below had no general or primary jurisdiction to adjudicate the title to this property, while that very question was being heard and determined in the Land Department on an application for patent. So far, then, as the order appointing a receiver is to be sustained as an incident to a general or primary jurisdiction which does not exist, it must fail.

II.

The bill in this case was not framed to invoke the aid of the court in protecting the property pending final disposition of the patent application by the Land Department—it ignores the proceedings in the Department—and it does not afford a basis for the appointment, in that view, of a receiver.

It is said by Judge Bean, in his opinion below:

> "If, however, I am mistaken as to the extent of the jurisdiction, the government is clearly entitled, upon the allegations of the bill and the showing made, to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department."

He then calls attention to the government's claim that the discovery of gypsum was merely a subterfuge, and that there was an accommodation loca-

tion. He makes no finding as to whether the government has sustained these charges by a preponderance of evidence—indeed, he declines to express an opinion upon it and will only go so far as to say that there is substantial ground for the government's position. The opinion does not go into the question as to whether the company had a status, within the Pickett Act, in respect to its exploration and discovery of oil.

Now, the bill in this case does not ask for any protective relief—for an injunction or a receiver —until the decision of the Land Department upon the matters pending therein. It ignores those proceedings. As we have already pointed out, it impugns the *bona fides* of the location, alleges in paragraph IV (Tr., p. 6) that the company entered upon the land "long subsequent to the 27th day of September, 1909, for the purpose of exploring said land for petroleum and gas," describes the company as a trespasser (Tr., p. 7), and prays that the defendants be enjoined from committing any trespass or waste upon the land (Tr., p. 12).

Not a word beyond the imputation as to the *bona fides* of the location; not a word beyond a trespass alleged to have begun "long subsequent to the 27th day of September, 1909." Not a syllable about any application for patent, or about the notice thereof, or the payment of the purchase price, or the issuance of the receiver's receipt; not a syllable about

the pendency of these very charges, or of any proceeding whatever, in the Land Department. Those proceedings are ignored.

In *Cosmos Co. v. Grey Eagle Co.*, 190 U. S. 302, the question of title, depending though it was, as here, in the Land Department, was brought into the federal court, on the equity side, for adjudication and determination; and as incidental to the general jurisdiction thus ascribed to the court, an injunction and receiver were asked for. The Supreme Court, at the threshold of its opinion, (p. 308) observes:

> "The court is therefore called upon, in advance of and without reference to the action of the land department, to determine complainant's right and title to the three-quarters interest in the selected land, and a final decree is asked determining the interest of the parties in this land, *while the question in relation to title is still properly before the land department and not yet decided.* This we cannot do."

And further (p. 308):

> "An examination of the complainant's bill shows that it does not ask for an injunction *until the decision of the land department upon the matters pending therein. The complainant ignores those proceedings*, so far as to claim now the final adjudication by the court based upon its alleged equitable title to a three-quarters interest in the land selected."

And again (p. 315):

> "The bill is not based upon any alleged

> power of the courts to prevent the taking out of mineral from the land, *pending the decision of the land department upon the rights of complainant*, and the court has not been asked by any averments in the bill or in the prayer for relief to consider *that question.*"

Indeed, Judge Bean himself in one of his more recent decisions (*U. S. v. Record Oil Co., et al.*, No. A-41), in dismissing a bill, remarked:

> "It is claimed, also, that in any event the plaintiff is entitled to invoke the aid of a court of equity to protect the property from waste and destruction pending final disposition of the patent application by the land department. But *the bills* are not framed on that theory, and *contain no allegation* upon which such a decree could be based."

It is now, therefore, respectfully submitted that the order appointing a receiver should be reversed.

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